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**Preliminary report on the protection of persons in the event of disasters**

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## I. Introduction\*

### A. Inclusion of the topic in the programme of work of the International Law Commission

1. At the fifty-fourth session of the International Law Commission in 2002, its Planning Group established the Working Group on the Long-term Programme of Work, chaired by Mr. Alain Pellet,<sup>1</sup> which was reconstituted at the Commission's fifty-eighth session in 2006.<sup>2</sup> During that quinquennium, the Working Group requested its members, other Commission members and the Secretariat to prepare drafts on a number of topics. A proposal concerning international protection of persons in critical situations had been submitted by Mr. Maurice Kamto in 2004 for the consideration of the Working Group.<sup>3</sup> The Codification Division of the Office of Legal Affairs of the United Nations Secretariat, which serves as the secretariat of the Commission, submitted proposals to the Working Group, under the title "International disaster relief law", during the fifty-eighth session of the Commission in 2006.<sup>4</sup> At that session, the Commission expressed its appreciation for the valuable assistance rendered by the Codification Division in the preparation of such proposals.<sup>4</sup> At the same session, the Planning Group recommended, and the Commission endorsed without discussion, the inclusion in its long-term programme of work of the topic "Protection of persons in the event of disasters"<sup>5</sup> and, as the syllabus on that topic, reproduced the Secretariat's proposal as annex C to its report.

2. At its fifty-ninth session in 2007, the Commission decided to include the topic in its current programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.<sup>6</sup>

3. At its sixty-first session, the General Assembly, on the recommendation of its Sixth Committee, adopted resolution 61/34 of 4 December 2006, entitled "Report of the International Law Commission on the work of its fifty-eighth session", by which, inter alia, it took note of the decision of the Commission to include five topics in its long-term programme of work.

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<sup>1</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum (A/57/10 and Corr.1)*, para. 521.

<sup>2</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 256.

<sup>3</sup> Copies are on file with the Codification Division.

<sup>4</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 261.

<sup>5</sup> *Ibid.*, para. 257.

<sup>6</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 375.

4. At its sixty-second session, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 62/66 of 6 December 2007, entitled "Report of the International Law Commission on the work of its fifty-ninth session", by which, *inter alia*, it took note of the decision of the Commission to include the topic "Protection of persons in the event of disasters" in its programme of work.

5. During the consideration by the Sixth Committee in 2007 of the Commission's report on the work of its fifty-ninth session, a number of representatives welcomed the inclusion of the topic in the Commission's programme of work,<sup>7</sup> while one representative continued to have doubts as to whether the topic was appropriate for the codification or progressive development of international law.<sup>8</sup>

6. Upon his appointment, the Special Rapporteur undertook to establish initial contacts with representatives of interested governmental and non-governmental organizations, including the Representative of the Secretary-General on the human rights of internally displaced persons, the Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs, and senior officials of the International Disaster Response Laws, Rules and Principles Programme of the International Federation of Red Cross and Red Crescent Societies (IFRC).

7. For the benefit of the Special Rapporteur, a one-day round-table meeting on the topic "Protection of persons in the event of disasters" was convened at the University of Cambridge by the Lauterpacht Centre for International Law in March 2008. The meeting was presided over by the Director of the Centre, Professor James Crawford, a former member and Special Rapporteur of the Commission, and was attended by 18 participants who brought to the discussion a variety of relevant expertise.

8. At its fifty-ninth session in 2007, the Commission expressed its appreciation for the valuable assistance of the Codification Division in the preparation of research projects, by providing legal materials and their analysis.<sup>9</sup> At that session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic, "Protection of persons in the event of disasters".<sup>10</sup> The Special Rapporteur takes this opportunity to express, as did the Commission, his appreciation to the Legal Counsel and, in particular, the Director and members of the Codification Division for their most comprehensive study which will doubtless prove to be an indispensable point of reference in the Commission's future work on the topic. The Special Rapporteur also expresses his thanks to the Division for furnishing him with background material, including

<sup>7</sup> See the statements made by Benin (A/C.6/62/SR.18, para. 47), Egypt (A/C.6/62/SR.18, para. 71), Guatemala (A/C.6/62/SR.19, para. 12), United Kingdom of Great Britain and Northern Ireland (A/C.6/62/SR.19, para. 42), Sri Lanka (A/C.6/62/SR.19, para. 55), India (A/C.6/62/SR.19, para. 107), Poland (A/C.6/62/SR.20, para. 1), United States of America (A/C.6/62/SR.20, para. 23), Hungary (A/C.6/62/SR.21, para. 7), Greece (A/C.6/62/SR.21, para. 53), Romania (A/C.6/62/SR.21, para. 78), Israel (A/C.6/62/SR.21, para. 99), Kenya (A/C.6/62/SR.21, para. 112), Sierra Leone (A/C.6/62/SR.24, para. 100) and New Zealand (A/C.6/62/SR.25, para. 19).

<sup>8</sup> See the statement made by Portugal (A/C.6/62/SR.19, para. 77).

<sup>9</sup> *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 386.

<sup>10</sup> *Ibid.* The study will be issued as document A/CN.4/590 and Add.1-3.

bibliographical references. With the benefit of the Secretariat study and keeping in mind the preliminary character of the present report, the Special Rapporteur deems it more economical to refrain as much as possible from duplicating the information provided by the Secretariat in its study.

## **B. Purpose of the present report**

9. The present report is of necessity preliminary in character. It is mainly intended to deal in a general way with the scope of the topic, in order to properly circumscribe it. It is, therefore, an exploratory rather than a definitive study. It will attempt to identify the basic assumptions that should inform the work of codification and progressive development of the topic. To that end, it will raise a number of preliminary questions, some of which were dealt with to a certain extent in the Secretariat's initial proposal for the topic. Whereas that proposal focused on the general principles applicable to the operational mechanisms, the present report places emphasis on the general scope of the subject. Its purpose is to broadly outline the questions that need to be considered at the outset by the Commission in connection with the protection of persons in the event of disasters and the legal problems that they give rise to. The report aims to stimulate discussion in the Commission in order to provide the Special Rapporteur with the requisite guidance as regards the approach to be followed.

10. In including the topic in its long-term programme of work, the Commission gave it the title of "Protection of persons in the event of disasters". However, there are no official records that would throw light on the reasons that might have led the Commission to single out "protection of persons" over "relief" or "assistance", the basic aspect emphasized by the Secretariat in its original proposal. There is, therefore, a need at the preliminary stage clearly to define the topic, elucidating its core principles and concepts.

11. An initial step in the process involves determining the scope of the topic, not only *ratione materiae* but also *ratione personae* and *ratione temporis*. The title agreed to by the Commission — protection of persons in the event of disasters — must have some bearing on its scope. On the face of it, it may imply that the work to be undertaken would not entail an exhaustive analysis of the legal ramifications of disasters but only those that pertain to the protection of persons.

12. The title also imports a distinct perspective, that is, of the individual who is a victim of a disaster, and therefore suggests a definite rights-based approach to treatment of the topic. The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, in *casu*, is entitled. To paraphrase the Secretary-General,<sup>11</sup> a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.

13. The present report first traces the evolution of the protection of persons in the event of disasters. Next, reference is made to the sources and international efforts to

<sup>11</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 1 (A/53/1)*, para. 174.

codify and develop the law on this topic. The report then presents in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered. Lastly, the Special Rapporteur advances a tentative conclusion without prejudice to the outcome of the discussion that the report aims to trigger in the Commission.

## II. Background

### A. Evolution of the protection of persons in the event of disasters

14. Disasters have always played an important part in the history of the human species. Examples include the eruption of Vesuvius in 79 AD, the plague that occurred during the Middle Ages and the tsunami which struck large parts of Asia in 2004. Considerations of humanity have informed the moral appeals to assist victims of disasters and the solidarity in response to disasters. It is worth recalling that orders of chivalry, such as the Knights of Malta, better known as the Order of Saint John, founded in 1080, provided relief to those in need, including those affected by disasters. With the rise of the modern nation State and international law, the Swiss diplomat and lawyer Emer de Vattel wrote in 1758 a passage often quoted:

"... when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk ... if a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity ... To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so ... Whatever be the calamity affecting a Nation, the same help is due to it".<sup>12</sup>

15. However, 100 years would pass before another Swiss citizen, Henri Dunant, would successfully rally support for international norm-setting to effectively assist victims in the event of armed conflict as a form of disaster. The creation of the International Committee of the Red Cross and the adoption of the Geneva Convention of 1864 resulted from the concerns expressed over the protection of those wounded in the field during armed conflict. The first arrangements for the protection and assistance to be given to certain groups of persons were thus made in the context of warfare.

16. Equal recognition of the needs of those affected by other disasters began to come about in the second half of the nineteenth century. In accordance with their mandate,<sup>13</sup> national Red Cross and Red Crescent societies provide assistance and relief in disasters which may afflict peoples during peacetime as a condition of their vigorous development and a useful preparation for their wartime work; in peacetime, they devote themselves to humanitarian work that corresponds to their wartime duties, that is, giving relief in case of public calamity which, like war,

<sup>12</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, text of 1758, Books I to IV, translation by Charles G. Fenwick with an introduction by Albert de Lapradelle (Carnegie Institution of Washington, 1916), vol. III, p. 114.

<sup>13</sup> See resolution 3 of the Second International Red Cross Conference, Berlin, 1869.

demands immediate and organized assistance. Nevertheless, the provision of international assistance to victims of disasters other than armed conflict has only positioned itself as a major issue on the agenda of the international community since the beginning of the twentieth century. The importance attached to disaster relief has gained further recognition over the course of the past century as the frequency, intensity and complexity of disasters increased. With the formation of the International Red Cross and Red Crescent Movement and the establishment of the International Relief Union (IRU),<sup>14</sup> international disaster relief began to make its way into the realm of international law. Since then, the legal aspects of the subject have increasingly attracted attention at the international level. Whereas mutual self-interest has driven States to conclude instruments concerning their conduct in war, international cooperation in the area of protection and assistance in the event of disasters has taken on a wider dimension. Enhanced international solidarity in the event of disasters has reinforced the need for greater regulation of international law.

17. Protection and assistance activities undertaken in the event of disasters have generally been approached pragmatically. This is reflected in the steady growth of regulatory frameworks, mostly on a bilateral basis but also through the organs of the United Nations and its specialized agencies and entities such as the International Red Cross. International law-making and organizational developments in disaster governance reveal both the recurring need to deal with the protection of persons and the approach of the international community in that regard. These two themes — international legislation and organization — go hand in hand for purposes of providing adequate and effective assistance to those affected by a humanitarian emergency, such as a disaster.<sup>15</sup>

18. In 2001, IFRC undertook to evaluate the dispersed body of existing international and national norms relating to disaster relief by implementing its International Disaster Response Laws (IDRL) project. On the basis of the project's results, the International Red Cross and Red Crescent Movement, consisting of the Red Cross and Red Crescent organs and the States Parties to the Geneva Conventions, recently (in November 2007) adopted a set of operational guidelines on assistance in the event of disasters. According to IFRC, the legal core of international disaster relief law consists of the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related to disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities,<sup>16</sup> and is grounded on the premise that such activities apply in the event of a disaster, regardless of its origin, except in situations of armed conflict which are covered by international humanitarian law. Moreover, the primary focus of IDRL is on the operational side of protection, namely, assistance.

<sup>14</sup> The Convention and Statute Establishing an International Relief Union was opened for signature in 1927 and entered into force in 1932; the Union is, however, no longer in operation.

<sup>15</sup> F. Kalshoven, "Assistance to the victims of armed conflicts and other disasters", in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflicts and Other Disasters*, Papers delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988 (Dordrecht, Netherlands, Martinus Nijhoff Publishers, 1989), p. 14.

<sup>16</sup> International Federation of Red Cross and Red Crescent Societies, "International disaster response laws (IDRL): project report 2002-2003" (03/IC/11), p. 15 (available at [www.icrc.org/Web/eng/siteeng0.nsf/html/5XRD7](http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XRD7)).

19. An IFRC desk study,<sup>17</sup> and the Secretariat's study both identify a distinct corpus of law relating to international disaster response and relief, and provide detailed inventories of its various sources. There exists a significant number of bilateral treaties dealing with matters of mutual assistance. In addition, IDRL is informed by a considerable amount of soft law instruments applicable to humanitarian assistance activities in the event of disasters, notably decisions of organs of the United Nations and other international organizations. Not surprisingly, the precepts making up IDRL vary significantly from one another in their material, spatial and temporal dimensions. Therefore, assessing the weight of IDRL and the level of support it garners within the international community is by no means straightforward.

20. On a wider conceptual level, IDRL shares with international humanitarian law a significant number of fundamental principles which will usefully guide its future development.<sup>18</sup> Furthermore, IDRL draws on international human rights law and international law on refugees and internally displaced persons. To that extent, the sources that inform IDRL are largely the same as those that underlie the present, distinct topic, as outlined in section B below. At the same time, IDRL raises questions vis-à-vis the topic under consideration by the Commission, including how to classify, as opposed to merely identify, existing law and practice.

## **B. Sources**

21. Three immediate sources of present-day international disaster protection and assistance can be singled out: international humanitarian law, international human rights law and international law on refugees and internally displaced persons. For the purposes of the present report, it suffices to give a brief characterization of each of these three sources from the perspective of the topic under consideration.

### **1. International humanitarian law and humanitarian assistance**

22. As pointed out, the first agreements concluded by States recognizing humanitarian concerns and humanitarian action were limited to a particularly grave emergency situation: armed conflict. Historically, the dynamics of armed conflict have stood out from those of peacetime situations. Based on the principles of humanity, neutrality and impartiality, specific standards of conduct were developed, including those for international assistance. These initial agreements focused, in particular, on protection and assistance given to the military rather than the civilian population. However, owing to the increase in the number of civilian victims suffering the effects of war, the protection of all those hors de combat became a major focus of subsequent agreements concerning the behaviour of parties engaged in armed conflict.

23. The agreements dealing with conduct during armed conflict gradually formed the body of law known today as international humanitarian law,<sup>19</sup> a field of law that

<sup>17</sup> D. Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

<sup>18</sup> M. H. Hoffman, "What is the scope of international disaster response law?", in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, (International Federation of Red Cross and Red Crescent Societies, Geneva, 2003), pp. 13-20.

<sup>19</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at paras. 74-87.

has been codified in a fairly comprehensive manner. The application of international humanitarian law is conditioned upon the existence of an armed conflict and upon persons belonging to specific categories. At any rate, the multifaceted layers of protection offered by international humanitarian law envisage the individual as the ultimate beneficiary.<sup>20</sup>

24. The basic rules of providing relief to the civilian population in armed conflict, that is, humanitarian assistance, are embodied in the Geneva Conventions of 1949<sup>21</sup> and the Additional Protocols thereto, of 1977.<sup>22</sup> The rules found in these instruments reflect to a large extent the corresponding customary rules.<sup>23</sup> In addition, rules can be found in agreements between the parties to a conflict or between one or more parties to a conflict and the International Committee of the Red Cross (ICRC). Moreover, whether intergovernmental or not, international organizations such as IFRC, the main organs of the United Nations and the specialized agencies, and departments of the United Nations Secretariat such as the United Nations Office for the Coordination of Humanitarian Affairs, play a major role through their internal rules and decisions on matters of relief in conflict situations, including peacekeeping missions.<sup>24</sup> Consequently, in conflict situations there exists a large body of law dealing with assistance that may not only inspire rules on the protection of persons in the event of disasters but may even be applied by analogy, to the extent that a rule is relevant to disaster situations other than armed conflict.

## 2. International human rights law as the paradigm for a rights-based approach to protection

25. International human rights law comprises rights and freedoms enjoyed by the individual by virtue of international law. International human rights law bestows upon the individual the status of rights holder. States are under permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law.

26. In the context of disasters, a number of human rights are of particular importance. Examples of the rights that are pertinent in the event of a disaster include the right to life,<sup>25</sup> the right to food,<sup>26</sup> the right to health and medical services,<sup>27</sup> the right to the supply of water,<sup>28</sup> the right to adequate housing, clothing

<sup>20</sup> R. Provost, *International Human Rights and Humanitarian Law* (Cambridge, Cambridge University Press, 2002), p. 34.

<sup>21</sup> United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

<sup>22</sup> *Ibid.*, vol. 1125, Nos. 17512 and 17513.

<sup>23</sup> See J.-M. Henkaerts and L. Doswald-Beck, *Customary Rules of International Humanitarian Law*, ICRC study in two volumes (Cambridge, Cambridge University Press, 2005).

<sup>24</sup> B. Jakovljević, "International disaster relief law", in *Israel Yearbook on Human Rights*, vol. 34 (2004), p. 256.

<sup>25</sup> International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 6.

<sup>26</sup> International Covenant on Social, Economic and Cultural Rights, United Nations, *Treaty Series*, vol. 993, No. 14531, art. 11.

<sup>27</sup> *Ibid.*, art. 12.

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, No. 20378, art. 14, para. 2 (h).

and sanitation,<sup>29</sup> and the right not to be discriminated against.<sup>30</sup> The link between international human rights law and disasters has not yet been generally reflected in existing hard law instruments on either subject. To date, only two international human rights instruments are expressly applicable in the event of disasters. The Convention on the Rights of Persons with Disabilities<sup>31</sup> does not refer to a right to protection, the provision being formulated rather as an obligation on the contracting State to ensure protection and safety in the occurrence of a natural disaster.<sup>32</sup> Equally, the African Charter on the Rights and Welfare of the Child explicitly sets forth the obligation to ensure that a child receives appropriate protection and humanitarian assistance.<sup>33</sup> The relevant provisions of both of the aforementioned instruments refer to international human rights law and international humanitarian law as the context in which those obligations should be fulfilled. The nature of these provisions would, thus, seem to set public order standards for States, informed by the principle of humanity rather than that of individual rights. In this connection, it is important to recall that each human right is deemed to entail three levels of obligation on the State: the duty to respect, protect and fulfil.<sup>34</sup> A rights-based approach to protection and assistance in the event of disasters contemplates those obligations as well.

### 3. International law on refugees and internally displaced persons and disasters

27. Disasters often generate the mass displacement of persons, either across borders (refugees) or within those of a disaster-affected State (internally displaced persons). Refugees and internally displaced persons are generally treated as distinct categories entitled to particular rights by virtue of a situation-specific protection regime.

28. International refugee law has been developed against the background of displacement caused by persecution and destruction during armed conflict, in particular the Second World War, which led to the adoption in 1951 of the

<sup>29</sup> International Covenant on Social, Economic and Cultural Rights ..., art. 11.

<sup>30</sup> International Covenant on Civil and Political Rights ..., art. 2.

<sup>31</sup> General Assembly resolution 61/106 of 13 December 2006, annex 1.

<sup>32</sup> *Ibid.*, art. 11.

<sup>33</sup> African Charter on the Rights and Welfare of the Child, Organization of African Unity document CAB/LEG/24.9/49 (1990), art. 23, paras. 1 and 4.

<sup>34</sup> See, for example, the comments made by the Human Rights Committee in 1982 concerning article 6 (Right to life) of the International Covenant on Civil and Political Rights, in which the Committee considered that States should take positive measures to "eliminate malnutrition and epidemics" (HR/GEN/1/Rev.7, sect. II, general comment No. 6, para. 5). These levels of obligation have been more explicitly addressed in the context of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights, in considering in 1999 article 11 of the Covenant (Right to adequate food), commented that (a) "States had a core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters," (b) "the State had to demonstrate that every effort had been made to use all the resources at its disposal", and (c) that if it was unable to carry out its obligation, it had the burden of proving that this was the case and that it had "unsuccessfully sought to obtain international support" (*ibid.*, sect. I, general comment No. 13, paras. 6 and 17).

Convention relating to the Status of Refugees,<sup>35</sup> the cornerstone document of international refugee law. International refugee law obliges a State to provide protection to persons entitled to the status of refugee in cases in which such persons are not adequately protected in their State of origin because of its unwillingness or inability to do so. The occurrence of a disaster is not envisaged as grounds for granting refugee status. However, it is often in an emergency situation, such as a disaster, where persecution — a legal ground for the granting of refugee status — is likely to take place. In addition, a party to the 1951 Refugee Convention, under article 23, has the obligation to accord refugees lawfully staying in its territory the same treatment in respect of public relief and assistance as accorded its own nationals.

29. At present, there is no legally binding instrument governing internally displaced persons. An authoritative (non-binding) source of norms guiding the protection of internally displaced persons is the Guiding Principles on Internal Displacement, elaborated by the Representative of the Secretary-General on Internally Displaced Persons (E/CN.4/1998/53/Add.2, annex).<sup>36</sup> The Guiding Principles provide for the protection, inter alia, of those displaced by a natural or man-made disaster.<sup>37</sup> In particular, the Guiding Principles expressly state that the primary responsibility for protection and assistance lies with the national authorities and that internally displaced persons have the right to request and to receive protection and assistance from them.<sup>38</sup>

#### 4. Legal instruments specifically applicable to assistance in the event of disasters

30. The three sets of rules described above determine in a general way the legal context in which the protection of persons takes place. However, a vast number of more directly applicable instruments is available, specifically tailored to the operational component of protection (i.e., assistance) in the event of disasters. The Special Rapporteur does not find it useful to repeat here the exhaustive list of instruments identified in the Secretariat study.<sup>39</sup> For the purposes of the present report, it suffices to highlight certain significant legal frameworks and norm-setting trends in the event of disasters.

##### Multilateral treaties

31. While no universal comprehensive instrument dealing with the general aspects of protection of persons in the event of disasters exists at the multilateral level, a

<sup>35</sup> United Nations, *Treaty Series*, vol. 189, No. 2545. The convention and the 1967 Protocol thereto (ibid., vol. 606, No. 8791) entered into force 4 October 1967. See also the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa of 1969 (ibid., vol. 1001, No. 14691) and the Cartagena Declaration on Refugees, adopted on 22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (International Journal Refugee Law, vol. 3, No. 2, April 1991).

<sup>36</sup> See also Protocol on the Protection and Assistance of Internally Displaced Persons adopted on 30 November 2006 by the International Conference on the Great Lakes Region, in which Member States undertake to adhere to the Guiding Principles on Internal Displacement. Available at [http://www3.brookings.edu/fp/projects/idp/GreatLakes\\_IDPprotocol\\_final.pdf](http://www3.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol_final.pdf).

<sup>37</sup> Guiding Principles (E/CN.4/1998.53/Add.2, annex): "Introduction: scope and purpose", para. 2.

<sup>38</sup> Ibid., guiding principles 3 and 25.

<sup>39</sup> A/CN.4/590/Add.2 (to be issued). For a detailed survey of applicable rules and instruments, see also Fisher, op. cit., part II, at pp. 33-87.

number of instruments, both universal and regional, deal with specific aspects of protection. Moreover, a considerable number of soft law and non-legal pronouncements has been prepared and adopted, including under the aegis of or in collaboration with the United Nations. Furthermore, the non-governmental community has contributed through the adoption of guidelines or model rules.

32. The first multilateral treaty exclusively concerned with the general aspects of disaster relief was the Convention and Statute of the International Relief Union (1927). However, it only contributed to relief on two occasions.<sup>40</sup> Though technically still in force among 17 States, the assets and responsibilities of the Union were transferred to the United Nations by the Economic and Social Council in its resolution 1268 (XLIII) of 4 August 1967. One of the main reasons for the Union becoming inactive was the structure of the Convention. The treaty system was considered weak as it relied on specific rights and duties without taking into account their legal underpinnings and thereby identifying the applicable general rights and duties.<sup>41</sup> It is worth noting that the scope of the Convention covered both armed conflict and peacetime situations.<sup>42</sup>

33. There are at present only two universal treaties in force which contain general rules for the provision of international assistance: (a) the Framework Convention on Civil Defence Assistance, adopted in 2000, which deals with cooperation among national civil defence entities; and (b) the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, adopted in 1998 and which entered into force in 2005. The latter Convention offers a comprehensive legal framework for the provision of telecommunications assistance during disaster relief operations, including the coordination of such assistance and the reduction of regulatory barriers. It deals with an important number of general issues, albeit limited to telecommunications, which could influence more general future codification. It should be noted that the Convention does not contain a statutory limitation to its applicability in armed conflict. Besides, it incorporates non-governmental organizations as assisting actors granted a number of specific facilities. Neither instrument has attracted wide participation and both have suffered from ineffective application in the field.

34. A number of relevant agreements have been adopted at the regional and subregional levels, for example, in Europe, Latin America and Asia. The regional treaties are of particular relevance to the study of this topic in that they tend to be more general in nature, covering a wide range of issues. The most recent such agreement is the Agreement on Disaster Management and Emergency Response, adopted by the Association of Southeast Asian Nations (ASEAN)<sup>43</sup> on 26 July 2005 following the tsunami of December 2004, which reflects much of contemporary thinking in terms of disaster mitigation and risk reduction and addresses international cooperation in disaster response. Some of the agreements establish regional entities entrusted with mandates to undertake a variety of tasks.

<sup>40</sup> P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Dordrecht, Netherlands, Martinus Nijhoff Publishers, 1985), p. 370.

<sup>41</sup> *Ibid.*, p. 372.

<sup>42</sup> *Ibid.*, p. 367.

<sup>43</sup> Available at <http://aseansec.org/17579.htm>.

### Bilateral treaties

35. The multilateral agreements are, in turn, buttressed by a significant number of bilateral agreements regulating the provision of assistance and cooperation among States, primarily, although not exclusively, in Europe (see E/CN.4/590/Add.2).<sup>44</sup>

### Domestic legislation

36. Almost every country in the world has legislation dealing with national calamities or aspects thereof. While some States have put into place legislation that deals specifically with disaster-related matters, such as risk reduction, provision of assistance and civil defence, it is worth bearing in mind that, as pointed out in the study by the Secretariat (A/CN.4/590),<sup>44</sup> States regulate different aspects of disaster prevention and response through a variety of domestic laws, such as those on the protection of the environment and conservation, forestry, health, food safety, sanitation, epidemics, security, safety, protection, civil defence, immigration, customs duties and tariffs, search and rescue, emergencies, water, fire safety, prevention of industrial accidents, taxation, meteorology, spatial planning, and earthquake prevention. According to the same study, on a number of issues the national rule is determinative either by way of providing the content for an international norm or by serving to trigger the operation of international cooperation.

### Other key instruments

37. The existing body of international treaties and agreements on disaster relief (encompassing both prevention and assistance) is in turn supplemented by a number of non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. For example, a survey jointly carried out by the former Office of the United Nations Disaster Relief Co-ordinator and the League of Red Cross Societies resulted in a series of recommendations designed to expedite international relief by facilitating the functioning of relief personnel and the delivery of relief consignments. These measures to expedite international relief<sup>45</sup> were endorsed by the General Assembly in resolution 32/56 of 8 December 1977.

38. The General Assembly, by resolution 46/182 of 19 December 1991, established the basic framework within which contemporary disaster relief activities are undertaken. In that resolution, the Assembly recognized as key areas of activity disaster prevention and mitigation, preparedness, improved stand-by capacity and coordination, cooperation and leadership in the provision of disaster assistance, and laid down a number of guiding principles. It also established the linkage among relief, rehabilitation and development.

39. Special mention might also be made of the Principles and Rules for Red Cross and Red Crescent Disaster Relief,<sup>46</sup> the 1969 Red Cross Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster

<sup>44</sup> Document to be issued.

<sup>45</sup> See the report of the Secretary-General on the Office of the United Nations Disaster Relief Co-ordinator (document A/32/64 and Corr.1), annex II, paras. 1-3.

<sup>46</sup> Adopted by the Twenty-first International Conference of the Red Cross (Istanbul, 1969) and revised by the Twenty-second to Twenty-sixth Conferences (Tehran (1973), Bucharest (1977), Manila (1981), Geneva (1986) and Geneva (1995), respectively), reprinted in *International Review of the Red Cross*, No. 310 (February 1996), annex IV.

Situations,<sup>47</sup> the Council of Europe resolution on precautions against natural and other disasters and the planning and provision of disaster relief, adopted in 1972,<sup>48</sup> and the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief adopted in 1995.<sup>49</sup> Other significant texts include the draft model agreement on international medical and humanitarian law adopted by the International Law Association in 1980,<sup>50</sup> the Model Rules for Disaster Relief Operations proposed by the United Nations Institute for Training and Research in 1982,<sup>51</sup> which were aimed at closing the lacunae in international humanitarian law regarding assistance to victims of disasters, the Guiding Principles on the Right to Humanitarian Assistance, adopted by the International Institute of Humanitarian Law in 1992,<sup>52</sup> the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, adopted in 1995,<sup>53</sup> the Guiding Principles on Internal Displacement, adopted in 1999 (E/CN.4/1998/53/Add.2, annex), the Sphere Project,<sup>54</sup> the Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the Oslo Guidelines) of 2006,<sup>55</sup> and the Operational Guidelines on Human Rights and Natural Disasters adopted by the Inter-Agency Standing Committee in 2006 (A/HRC/4/38/Add.1, annex).

40. Furthermore, in the 1980s a draft convention on expediting the delivery of emergency assistance was drawn up and submitted to the Economic and Social Council for consideration (see A/39/267/Add.2-E/1984/96/Add.2). Although the draft convention was never adopted, its provisions provide a useful reference point for the kinds of provisions that might eventually be included in a legal instrument were one to be adopted.

## 5. Recent developments

41. The increasing involvement in recent times of the international community in disaster situations has led to recognition of the need to improve regulatory law in the event of disasters to overcome the obstacles to the provision of effective assistance. Current developments attest to the importance attached to this need. They include the substantial number of resolutions related to the topic, which have been adopted by the General Assembly at its recent sessions in connection with

<sup>47</sup> Resolution XXVI of the Twenty-first International Conference of the Red Cross, held in Istanbul from 6 to 13 September 1969 (text in *International Review of the Red Cross*, No. 104, November 1969).

<sup>48</sup> Council of Europe, Committee of Ministers Resolution (72) 6 of 18 February 1972.

<sup>49</sup> Adopted by the Twenty-sixth International Conference of the Red Cross and Red Crescent held in Geneva, from 3 to 7 December 1995. Text available at <http://www.ifrc.org/publicat/conduct/code.asp>.

<sup>50</sup> Reproduced in *Report of the 59th Conference of the International Law Association*, Belgrade, 17-23 August 1980, pp. 520-527.

<sup>51</sup> United Nations Institute for Training and Research, *Policy and Efficacy Studies No. 8* (New York, 1982).

<sup>52</sup> Adopted at the seventeenth Round-table Meeting on Current Problems of Humanitarian Law of the International Institute of Humanitarian Law, held in San Remo, Italy, from 2 to 4 September 1992.

<sup>53</sup> Reprinted in *Human Rights Quarterly*, vol. 17 (1995), pp. 192-208.

<sup>54</sup> *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response*, handbook (Geneva, 2000), revised in 2004.

<sup>55</sup> Available at <http://ochaonline.un.org/Publications/tabid/1403/Default.aspx>.

many separate but related items of its agenda,<sup>56</sup> the resolution on humanitarian assistance, adopted by the Institute of International Law, at its session held in Bruges, Belgium, in 2003, the Hyogo Declaration, adopted by the World Conference on Disaster Reduction in 2005,<sup>57</sup> and the resolution endorsing the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the Thirtieth International Conference of the Red Cross and Red Crescent in 2007.<sup>58</sup>

#### 6. Customary international law

42. While this topic seems in principle to be the subject of progressive development, the possibility of identifying applicable customary norms should not be excluded. The IFRC desk study concerning the framing of IDRL recognizes that research does not suggest the existence of a system of customary IDRL.<sup>59</sup> It points out, however, that IFRC research might yet produce evidence warranting reconsideration of that point.<sup>60</sup>

### III. Scope of the topic

43. At the preliminary stage of work on the topic, the Special Rapporteur requires the Commission's guidance concerning the scope of the topic before he can be in a position to propose the corresponding draft article (or articles). To facilitate the discussion, three aspects of scope are treated below: *ratione materiae*, *ratione personae* and *ratione temporis*. The question of whether the scope should also be defined *ratione loci* is left open.

#### A. *Ratione materiae*: the concept and classification of disasters

44. The concept and classification of disasters have a significant bearing on the scope of the topic. Although disasters manifest themselves in different forms, they share common elements, the identification of which should assist in achieving a proper understanding of the concept itself.

45. A disaster situation arises from the vulnerability of human beings when exposed to a hazard. The Hyogo Framework for Action 2005-2015 defines a hazard as:

"A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural

<sup>56</sup> For a list of relevant General Assembly resolutions, see document A/CN.4/590/Add.2 (to be issued).

<sup>57</sup> See report of the World Conference on Disaster Reduction, held in Kobe, Japan, from 18 to 22 January 2005 (A/CONF.206/6 and Corr.1), resolution 7. See also the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (*ibid.*, resolution 2).

<sup>58</sup> Resolution 4, annex (currently available at [http://icrc.org/web/eng/siteengO.nsf/htmlall/p1108/\\$File/ICRC\\_002\\_1108.pdf!Open](http://icrc.org/web/eng/siteengO.nsf/htmlall/p1108/$File/ICRC_002_1108.pdf!Open)).

<sup>59</sup> Hoffman, *op. cit.*, p. 16.

<sup>60</sup> *Ibid.*, footnote 25.

(geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)".<sup>61</sup>

46. The term "disaster", however, is not a legal term. There is no generally accepted legal definition of the term in international law. While some international instruments prefer to completely omit a definition of disaster,<sup>62</sup> others provide an all-encompassing definition. An example of the latter includes the Tampere Convention of 1998, which defines a disaster as a serious disruption of the functioning of society that poses a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.<sup>63</sup>

47. One first aspect that can be singled out is that the concept of disaster does not differentiate between its occurrence in a single State or among multiple States. In other words, an international component (i.e., transboundary effects) is not a prerequisite. Second, it should be noted that the threshold is often expressed in terms of the degree of dysfunction of a State, region or society. The third element relates to the inherent suffering or damage that may result from the threat to human life, health, property or the environment. The international significance of the event may then be found in the unwillingness or inability of the affected State, region or society to cope with the disaster by using only its own resources. The above-mentioned elements, in which human suffering is a critical factor, typically generate attention and response at the international level. The role of assisting actors may then be qualified as that of agents of humanity,<sup>64</sup> an assertion that carries its own implications for the scope insofar as it relates to protection, as discussed in the section below.

48. It is common for international instruments to differentiate among disasters according to some pre-established criteria. To begin with, disasters can be divided into two categories, according to cause: natural disasters (e.g., earthquakes, tsunamis and volcanic eruptions) and man-made disasters (e.g., oil spills, nuclear accidents and armed conflict). Furthermore, disasters are often classified in terms of their duration as sudden-onset disasters (e.g., hurricanes) and slow-onset, or creeping, disasters (e.g., droughts, food shortages and crop failures). Lastly, a classification may be made according to the context in which the disaster occurs, that is, in a single or complex emergency. A complex emergency is generally defined as a humanitarian crisis in a country, region or society in which there is total or

<sup>61</sup> Report of the World Conference on Disaster Reduction ... (A/CONF.206/6 and Corr.1), resolution 2, footnote 2.

<sup>62</sup> For example, the Inter-American Convention to Facilitate Disaster Assistance of the Organization of American States, which was opened for signature on 7 June 1991 and entered into force on 16 October 1996.

<sup>63</sup> See article 1, para. 6 of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, adopted at Tampere, Finland, on 18 June 1998. See also article 1, para. 3, of the ASEAN Agreement on Disaster Management and Emergency Response (not yet into force), which states that "disaster" means a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses.

<sup>64</sup> D. Caron, "Addressing catastrophes: conflicting images of solidarity and separateness", in D. Caron and C. Leben (eds.), *The International Aspects of Natural and Industrial Catastrophes* (The Hague, Martinus Nijhoff, 2001), p. 1, at p. 13.

considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country programme.<sup>65</sup>

49. The Secretariat proposal for the topic suggested that it be limited initially to natural disasters, based on a perceived more immediate need.<sup>66</sup> For his part, the Special Rapporteur is of the view that the title eventually agreed upon by the Commission suggests a broader scope. Such an approach would seem best for achieving the underlying objective codification and progressive development of the topic, namely, fashioning rules for the protection of persons. The need for protection can be said to be equally strong in all disaster situations. The conceptual scope should envisage taking account of all of the aforementioned categories, thus acknowledging the complexities involved in the categorization of disasters according to their cause, duration and context. The categories may overlap. It is not always possible to maintain a clear delineation between causes, as may be the case with desertification and global warming. An apparent natural disaster can be caused or aggravated by human activity, for example, desertification caused by excessive land use and deforestation. Another example would be the occurrence of epidemics, which may not be the direct result of a human agency but may certainly be aggravated by it due to neglect of hygiene, in particular in camps of refugees or internally displaced persons. The foregoing demonstrates the high degree of arbitrariness in disaster categorization, militating in favour of a more holistic approach. However, armed conflict per se will be excluded because there is an applicable, highly developed particular field of law dealing in great detail with such situations of social reality: namely, international humanitarian law. This would accord with the approach taken in the advisory opinion on the legality of the threat or use of nuclear weapons, in which the International Court of Justice viewed the law applicable in armed conflict which is designed to regulate the conduct of hostilities as the applicable *lex specialis*.<sup>67</sup>

## **B. Ratione materiae: the concept of protection of persons**

50. As the title given to the topic must have a bearing on its scope, the concept of protection of persons calls for further examination. Persons affected by disasters do not constitute a separate legal category. However, because disaster victims face a very distinct factual situation, they do have specific needs that require addressing.

<sup>65</sup> Working paper on the definition of complex emergency, submitted to the Inter-Agency Standing Committee at its tenth meeting on 9 December 1994 (on file with the Codification Division). The concept of complex emergencies should be distinguished from what has been termed "complex disaster", that is where one disaster agent exposes vulnerabilities which open the way for the impact of other disaster agents. See R.C. Kent, *Anatomy of Disaster Relief: The International Network in Action* (London, Pinter Publishing, 1978), p. 6.

<sup>66</sup> *Official Records of the General Assembly, Sixty-first session, Supplement No. 10 (A/61/10)*, annex C, para. 2. See, however, the Secretariat's subsequent study where it took a more inclusive approach, noting that while the bulk of the study pertained to disasters emanating from natural phenomena, few of the legal instruments and texts cited maintained a clear distinction between natural and man-made disasters (A/CN.4/590, para. 8; to be issued).

<sup>67</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 25. Compare this with the position taken in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports, 2004*, p. 136, at para. 106.

The fundamental tenet of international humanitarian law and international human rights law applicable in the event of disasters is the principle of humanity which underpins all humanitarian action.<sup>68</sup>

51. In the first place, the concept of protection raises a general question when contrasted with the concepts of response, relief and assistance: should the concept of protection be seen as distinct, or as encompassing those other concepts? In any disaster situation, three phases can be distinguished: pre-disaster, the disaster proper and post-disaster. The concept of response restricts itself temporally to the disaster phase. Relief is a broader concept which, like assistance, encompasses the pre-disaster stage as well as the stage beyond immediate response. In the present context, assistance can be described as the availability and distribution of the goods, materials and services essential to the survival of the population. The elements of the concept of protection depend largely on the context or area of law in which the concept is employed. Protection can be said to be all-encompassing, covering the more specific concepts of response, relief or assistance with which it is often associated. One should, however, differentiate between protection *sensu lato* and protection *sensu stricto*. This may be conceptualized as follows: there is a general, all-encompassing concept of protection which includes protection in a strict sense, denoting a rights-based approach, and other concepts, in particular assistance.

52. For the purposes of the present topic, protection has been qualified as the protection of persons. The concept protection of persons is not new in international law; it reflects a particular relationship between the qualification of persons as being those affected by disasters, and the rights and obligations attached thereto. As stated above, the regimes of protection of persons are international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. These regimes may apply simultaneously to the same situation because they essentially complement each other.<sup>69</sup> In addition, they are guided by a basic identity of purpose: the protection of the human person in all and any circumstances.<sup>69</sup> The three areas of law underscore the essential universality of humanitarian principles. The protection of persons in the event of disasters is also predicated on such principles as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention.

53. While the title of the topic explicitly refers to the protection of persons, a protection regime often extends to protection of property and the environment. In this respect, the Special Rapporteur requires the guidance of the Commission as to whether these elements should also be treated, and with what degree of specificity.

54. It is important to define the rights and obligations that enter into play in disaster situations and the consequences that may flow from such rights and obligations. From the standpoint of the victims of disasters, this is a question not only of international humanitarian law but also of international human rights law, including the existence or not of a right to humanitarian assistance. The question of

<sup>68</sup> As far back as 1949, the International Court of Justice stated that the 1907 Hague Convention, one of the pillars of the modern international humanitarian law, contained certain general and well recognized principles, namely, elementary considerations of humanity, even more exacting in peace than in war. See *Corfu Channel case (United Kingdom v. Albania)*, *I.C.J. Report 1949*, p. 4, at p. 22.

<sup>69</sup> A. A. Cançado Trindade, "International law for humankind: towards a new *jus gentium*", part II, *Recueil des Cours de l'Académie de Droit International*, vol. 317 (2005), pp. 9-312, at p. 150.

the latter right is pertinent as it is presently uncertain whether existing international law takes into account all of the legitimate needs of persons affected by disaster or whether there are gaps in the law in this respect. In international humanitarian law that right has been recognized as a matter of law. In disaster situations, however, it appears that no legal instruments explicitly acknowledge the existence of such a right. At most, it could be said to be implicit in international human rights law. The nature of such a right is, however, unclear. Would it be a human right or just a right of those affected by a disaster? Would it be an individual right or a collective right? Against whom, if at all, would it be enforceable? After all, the criteria to determine the existence and status of a human right are subject to controversy. This raises the more fundamental question of whether international human rights law has developed in that direction. However, it could be argued that formulating and elaborating such a right to assistance in the event of disasters, as a matter of progressive development of the law, would prevent the risk of fragmentation of existing human rights because of the otherwise necessary but arbitrary selection of or emphasis accorded these rights.<sup>70</sup> At any rate, such an approach could be taken as constituting a challenge to the principle of the sovereignty of the State and its corollary of non-intervention,<sup>71</sup> according to which the State has primary responsibility to offer protection and assistance to those affected by disasters on its territory.<sup>72</sup> Tension is created between, on the one hand, the principles of the sovereignty of States and of non-intervention and, on the other, international human rights law.<sup>73</sup>

55. Another source of tension is often between the rights and obligations of the assisting actor and those of the State affected by a disaster. In view of the social, economic and political implications of disaster relief and governance, States might be inclined to redefine their sovereignty by means of a constructive use of international law. The traditional State system is currently witnessing the emergence of various concepts related to the responsibility of States. As the Secretariat noted in its proposal for the topic,<sup>74</sup> the protection of persons may be located within contemporary reflection on an emerging principle entailing the responsibility to protect. The latter concept entails the responsibility to prevent, react and rebuild, corresponding, respectively, to the three phases of a disaster situation. However, the

<sup>70</sup> J. Patnogie, "Some reflections on humanitarian principles applicable in relief actions", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva and The Hague, Martinus Nijhoff Publishers), p. 934.

<sup>71</sup> On sovereignty as a cardinal principle of international law, see *Corfu Channel case* (United Kingdom v. Albania), *I.C.J. Report 1949*, p. 4, at p. 35. On non-intervention, see *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), *I.C.J. Report 1986*, p. 14, paras. 202-205 (the "principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law") and General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>72</sup> See, for example, General Assembly resolution 46/182, annex, para. 3.

<sup>73</sup> This point has been acknowledged in the Mohonk Criteria, which states that the principles of non-intervention and sovereignty should not be used as an obstacle to humanitarian assistance, and that the objective of humanitarian assistance is to save lives and is not intended to challenge the State on whose territory it is delivered." See J. Ebersole, "The Mohonk Criteria for Humanitarian Assistance", *Human Rights Quarterly*, vol. 17 (1995), p. 159.

<sup>74</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, annex C, para. 9.

appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both require careful consideration. Even if the responsibility to protect were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear. For example, to what extent would the responsibility create rights for third parties? What would the contents of those rights be? What would trigger those rights? Would those rights be singular or collective?

### C. *Ratione personae*

56. The multiplicity of actors involved in disaster situations is a highly pertinent factor. Work on the topic will clearly need to take account of the role of international organizations, non-governmental organizations and commercial entities in addition to that of State actors. It will require assessing the practice of non-State actors and the weight to be accorded to it in order to place them properly within the framework of protection of persons in the event of disasters. There are pertinent questions to be posed. For example, is there a right of initiative, as is recognized as a matter of law in international humanitarian law instruments? Is a formal offer from or request to an assisting non-State actor necessary? What are the obligations of non-State actors to protect, if at all, as distinct from providing assistance? Does the individual have a right in relation to non-State actors? What is the position of commercial subcontractors? As these questions suggest, the legal consequences may differ, depending on the actor involved.

### D. *Ratione temporis*

57. A broad approach appears indicated as concerns the phases which should be included, in order to provide fully fledged legal space. The importance of a coherent framework in terms of rights and obligations becomes apparent when considering the wide range of specific issues to which providing disaster assistance gives rise through successive phases, not only of disaster response but also pre-disaster and post-disaster: prevention and mitigation on the one hand, and rehabilitation on the other. A good example is the potentially controversial question of prevention. It is interesting to note that the concept of responsibility to prevent is also a recognized component in the emerging concept of protection in international humanitarian law. However, the nature and extent of the purported obligation of States to prevent disasters (acting individually or collectively) raises profound questions, which may need to be addressed.<sup>75</sup> In this connection, work carried out by the Commission on the topic of prevention of transboundary damage from hazardous activities would be of relevance.

58. At the other end of the spectrum is the rehabilitation phase. Rehabilitation activities are properly linked to the response phase which addresses the immediate needs of individuals affected by a disaster. This should be distinguished from development activities, which can be described in terms of support to and implementation of autonomous development policies. These phases may not always

<sup>75</sup> See C. Romano, "L'obligation de prevention des catastrophes industrielles et naturelles", in Caron and Leben (eds.), *op. cit.*, pp. 379-428, and A. Berramdane, "L'obligation de prevention des catastrophes et risques naturelles", in *Revue de Droit Public*, vol. 113 (1997), pp. 1717-1751.

be easy to separate in reality, but their nature differs considerably *ratione materiae*, *ratione temporis* and *ratione personae*. It is the reason why the Special Rapporteur considers it appropriate not to consider such activities for the purposes of the present topic while treating the legal consequences of the rehabilitation phase carefully<sup>76</sup> so as not to be detrimental to the norms governing development matters.<sup>77</sup>

#### IV. Form of the work

59. Citing the Convention on the Privileges and Immunities of the United Nations as a possible model, the stated objective of the Secretariat's proposal for the topic was the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities.<sup>78</sup> In this connection, some consideration might be given at the outset to the qualitative purpose of the Commission's work on this topic. Is the Commission's task limited to codification of existing law and practice or will it extend beyond *de lege ferenda*? The Secretariat proposal indicated that the work would be primarily limited to the former, with emphasis on progressive development as appropriate. At any rate, the Commission has itself considered that its drafts constitute both codification and progressive development of international law in the sense in which those concepts are defined in the Statute, and has found it impracticable to determine into which category each provision falls.<sup>79</sup> Nevertheless, given the amorphous state of the law relating to international disaster response, striking the appropriate balance between *lex lata* and *lex ferenda* poses a singular challenge.

60. Regarding the form that the final product is to take, the Secretariat's proposal, by stating that the objective is the elaboration of a framework convention, would seem to have placed the emphasis on progressive development, in conformity with article 15 of the Commission's statute, which contemplates the progressive development of international law by means of the preparation of draft conventions. Nevertheless, in practice, the Commission has utilized a variety of other forms in which to couch its final drafts: model rules, principles, guidelines, declarations, codes etc. Regardless of the final form, the Commission, with few exceptions, embodies the result of its work in draft articles, prepared following its well-established methods of work. That should be also the case as regards the present topic. In conformity with its usual practice, the Commission's decision on the form

<sup>76</sup> See, for example, European Court of Human Rights, *Dogan v. Turkey* (Application Nos. 8803-8811/02, 8813/02 and 8815-8819/02), Third Section Judgment of 29 June 2004, para. 154, where the Court discussed the legal consequences of rehabilitation activities after the occurrence of an emergency. The relevant paragraph reads in part: "For the Court, however, the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (see in this respect principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998)".

<sup>77</sup> See the Declaration on the Right to Development (General Assembly resolution 41/128 of 4 December 1986, annex).

<sup>78</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, annex C, para. 24.

<sup>79</sup> *Yearbook of the International Law Commission*, various issues (see [http://treaty.un.org/ilc/ilcintro.htm#\\_ftn120](http://treaty.un.org/ilc/ilcintro.htm#_ftn120)).

to be recommended to the General Assembly for its final draft articles may, in principle, await the completion of work on the present topic. Nevertheless, the special characteristics of such a novel undertaking might make it advisable to arrive at an early understanding of what the final form should be, especially if guidelines, rather than a convention, might make the final draft more acceptable to States.

## V. Conclusions

61. The present, preliminary report is intended to provide a basis for a constructive discussion in the Commission which will facilitate determination of the general scope of the topic on the protection of persons in the event of disasters.

62. Without prejudice to the outcome of the Commission's discussion of the scope, it is the view of the Special Rapporteur that the title chosen for the topic implies a wide perspective. Work on the topic can be undertaken with a rights-based approach that will inform the operational mechanisms of protection.

63. The identification of the underlying principles and the elaboration of the rules derived therefrom need to be reflected in a future set of draft articles as regards each of the two elements of protection (a lesson that can be learned from the experience of the International Relief Union).

64. While the Commission requested the Secretariat to prepare a background study initially limited to natural disasters, the Special Rapporteur is of the view that the Commission could usefully embark, *pari passu*, on work concerning both natural and man-made disasters.

65. Work on the topic will clearly need to take account of the multiplicity of actors in disaster situations.

66. To achieve complete coverage, work on the topic should extend to all three phases of a disaster situation, but it would appear justified to give particular attention to aspects relating to prevention and mitigation of a disaster as well as to provision of assistance in its immediate wake.



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## International Law Commission

### Sixtieth session

Geneva, 5 May-6 June and 7 July-8 August 2008

## The obligation to extradite or prosecute (*aut dedere aut judicare*)

### Comments and information received from Governments

#### I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 62/66 of 6 December 2007, in which the Assembly, inter alia, invited Governments to provide to the International Law Commission information on practice regarding the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

2. At its fifty-eighth session, in 2006, the Commission decided in accordance with article 19 (2) of its Statute to request, through the Secretary General, Governments to submit information concerning their legislation and practice, particularly the more contemporary, with regard to this topic. More specifically, Governments were requested to provide information concerning:

"(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservation made by that State to limit the application of this obligation;

"(b) Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

"(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

"(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State."<sup>1</sup>

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<sup>1</sup> See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 30.



3. At its fifty-ninth session, in 2007, the Commission further requested Governments to submit information concerning their relevant legislation and practice, particularly the more contemporary, more specifically on:

“(a) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?”

“(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?”

“(c) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?”

“(d) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation *aut dedere aut judicare*?”<sup>2</sup>

4. At the same session, the Commission also indicated that it would appreciate information on:

“(a) Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?”

“(b) Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?”

“(c) Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent?”<sup>3</sup>

5. Comments received at the fifty-ninth session of the Commission were reproduced in document A/CN.4/579 and Addenda 1 to 4. Since then, and as at 30 May 2008, written observations have been received from the following five States: Chile, Guatemala, Mauritius, the Netherlands and the Russian Federation. Additional information received will be reproduced as addenda to the present report.

## II. Comments and information received from Governments

### Chile

6. As a complement to the information reproduced in document A/CN.4/579/Add.1, Chile submitted a list of multilateral treaties to which it is party, containing the obligation to extradite or prosecute: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>4</sup> adopted on 10 December 1984 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 808 of 7 October 1988, *Diario Oficial*, 26 November 1988;

<sup>2</sup> *Ibid.*, Sixty-second Session, Supplement No. 10 (A/62/10), para. 31.

<sup>3</sup> *Ibid.*, para. 32.

<sup>4</sup> United Nations, *Treaty Series*, vol. 1465, No. 24841.

Inter-American Convention to Prevent and Punish Torture, adopted on 9 December 1985 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 809 of 7 October 1988, *Diario Oficial*, 26 November 1988; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>5</sup> adopted on 14 September 1973 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 129 of 28 February 1977, *Diario Oficial*, 29 March 1977; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,<sup>6</sup> adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, *Diario Oficial*, 17 April 1951; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea,<sup>7</sup> adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, *Diario Oficial*, 17 April 1951; Geneva Convention relative to the Treatment of Prisoners of War,<sup>8</sup> adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, *Diario Oficial*, 18 April 1951; Geneva Convention relative to the Protection of Civilian Persons in Time of War,<sup>9</sup> adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, *Diario Oficial*, 19 and 20 April 1951; International Convention for the Suppression of the Financing of Terrorism,<sup>10</sup> adopted by the United Nations General Assembly on 9 December 1999 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 163 of 3 July 2002, *Diario Oficial*, 13 September 2002; International Convention for the Suppression of Terrorist Bombings,<sup>11</sup> adopted by the United Nations General Assembly on 15 December 1997 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 519 of 20 November 2001, *Diario Oficial*, 6 February 2002; International Convention against the Taking of Hostages,<sup>12</sup> adopted by the United Nations General Assembly on 17 December 1979 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 989 of 16 November 1981, *Diario Oficial*, 8 January 1982; Convention for the Suppression of Unlawful Seizure of Aircraft,<sup>13</sup> signed at The Hague on 16 December 1970 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 147 of 20 March 1972, *Diario Oficial*, 19 April 1972; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,<sup>14</sup> signed at Montreal on 23 September 1971 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 736 of 4 November 1975, *Diario Oficial*, 11 December 1975; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention of 1971,<sup>15</sup> signed at Montreal on 24 February 1988 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 519 of 10 July 1989, *Diario Oficial*, 9 September 1989;

<sup>5</sup> Ibid., vol. 1035, No. 15410.

<sup>6</sup> Ibid., vol. 75, No. 970.

<sup>7</sup> Ibid., No. 971.

<sup>8</sup> Ibid., No. 972.

<sup>9</sup> Ibid., No. 973.

<sup>10</sup> Ibid., vol. 2178, No. 38349.

<sup>11</sup> Ibid., vol. 2149, No. 37517.

<sup>12</sup> Ibid., vol. 1316, No. 21931.

<sup>13</sup> Ibid., vol. 860, No. 12325.

<sup>14</sup> Ibid., vol. 974, No. 14118.

<sup>15</sup> Ibid., vol. 1589, No. 1-14118.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,<sup>16</sup> adopted in Rome on 10 March 1988 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 793 of 3 June 1994, *Diario Oficial*, 8 August 1994; Convention on the Safety of United Nations and Associated Personnel,<sup>17</sup> adopted in New York on 9 December 1994 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 712 of 12 May 1999, *Diario Oficial*, 21 July 1999; United Nations Convention against Corruption, adopted in New York on 31 October 2003 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 375 of 23 November 2006, *Diario Oficial*, 30 January 2007; Inter-American Convention Against Corruption, adopted in Caracas on 29 March 1996 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 1879 of 29 October 1998, *Diario Oficial*, 2 February 1999.

## Guatemala

**International treaties by which Guatemala is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation**

7. Guatemala submitted the following list of relevant multilateral treaties: the four Geneva Conventions of 12 August 1949 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention); Convention relative to the Treatment of Prisoners of War (Third Convention); and Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention)); Single Convention on Narcotic Drugs of 30 March 1961;<sup>18</sup> Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention on Psychotropic Substances of 21 February 1971;<sup>19</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980;<sup>20</sup> International Convention for the Suppression of Terrorist Bombings of 15 December 1997; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; United Nations Convention against Transnational Organized Crime of 15 November 2000; United Nations Convention against Corruption of 31 October 2003; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

<sup>16</sup> Ibid., vol. 1678, No. 29004.

<sup>17</sup> Ibid., vol. 2051, No. 35457.

<sup>18</sup> Ibid., vol. 520, No. 6465.

<sup>19</sup> Ibid., vol. 1019, No. 14956.

<sup>20</sup> Ibid., vol. 1456, No. 24631.

8. Guatemala further noted that it is a party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948<sup>21</sup> and to the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, neither of which contains an obligation to extradite or prosecute, but both of which oblige States parties to establish jurisdiction over the corresponding offences and to extradite in accordance with the legislation of each State. In addition, Guatemala has signed, but not ratified, the Rome Statute of the International Criminal Court of 17 July 1998<sup>22</sup> and the Inter-American Convention on Extradition of 25 February 1981.

9. Guatemala also submitted a list of relevant regional treaties: Convention on Private International Law (Bustamante Code) of 20 February 1928; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance of 2 February 1971; Inter-American Convention to Prevent and Punish Torture of 9 December 1985; Inter-American Convention on Forced Disappearance of Persons of 9 June 1994; Inter-American Convention against Corruption of 29 March 1996; Inter-American Convention on Extradition of 26 December 1933; Central American Convention on Extradition of 7 February 1923.

10. Guatemala noted that its reservations to the multilateral and regional treaties listed above did not affect their provisions relating to the obligation to extradite or prosecute.

11. Guatemala further submitted a list of relevant bilateral treaties: Treaty on Extradition of Criminals between Guatemala and Belgium; Additional Convention to the Treaty on Extradition between Guatemala and Belgium; Additional Protocol to the Convention on Extradition between Guatemala and Belgium; Treaty on Extradition between Guatemala and Spain; Additional Protocol to the Treaty on Extradition between Guatemala and Spain; Treaty on Extradition between Guatemala and the United States of America; Supplementary Convention to the Treaty on Extradition between Guatemala and the United States; Treaty on Extradition between Guatemala and the United Kingdom of Great Britain and Northern Ireland; Additional Protocol to the Treaty on Extradition between Guatemala and the United Kingdom; Exchange of notes extending the provisions of the Treaty on Extradition to certain territories under the mandate of the United Kingdom; Treaty on Extradition between Guatemala and Mexico; Treaty on Extradition between Guatemala and the Republic of Korea.

12. Lastly, Guatemala reported that it had signed three treaties that have not yet entered into force: Agreement on Extradition between Guatemala and Brazil; Treaty on Extradition between Guatemala and Peru; Central American Treaty on Arrest Warrants and Simplified Extradition Procedures.

**Domestic legal regulations adopted and applied by Guatemala, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute**

13. Extradition is dealt with in article 27 of the Political Constitution of the Republic of Guatemala, which states that extradition is governed by the provisions

<sup>21</sup> Ibid., vol. 78, No. 1021.

<sup>22</sup> Ibid., vol. 2187, No. 38544.

of international treaties. This provision also states that extradition of Guatemalans shall not be attempted for political offences, and in no case will they be handed over to a foreign Government, except as established in treaties and conventions with respect to crimes against humanity or against international law. This article is the basis for ordinary domestic legislation on the subject, such as articles 5 and 8 of the Penal Code<sup>23</sup> (Decree No. 17-73 of the Congress of the Republic and its amendments) and other legal and regulatory provisions, such as articles 68 and 69 of the Act to Combat Trafficking in Narcotic Drugs, Agreement No. 8-2005 of the Supreme Court of Justice — which establishes which courts are competent to rule on extradition requests — and Supreme Court of Justice Registry Circular No. 3426-B of 13 May 1952.

14. Owing to the fact that under the Constitution extradition is governed by international treaties, the few domestic provisions in force on the subject are largely procedural in nature and supplementary to those treaties. Domestic legislation must comply with recognized international principles concerning extradition, for example, that extradition shall not be granted in the case of nationals of the requested country, for misdemeanours or minor offences punishable by less than one year in prison or for political offences or related ordinary offences, and that the person being extradited will not be given a harsher sentence than the sentence applicable in the requested country or the death sentence.

15. As regards the obligation not to hand over nationals, article 27 of the Constitution prohibits the extradition of nationals only in the case of political offences, but makes an exception for crimes against humanity or against international law, in accordance with the international treaties to which Guatemala is a party. Accordingly, it may be inferred by exclusion that the Constitution does not prohibit the handover of nationals, since the Guatemalan authorities have discretion to grant or deny extradition. If they deny an extradition request, however, there is an obligation to prosecute.

16. In the same vein, article 5, paragraph 3, of the Penal Code provides an example of a specific case in which Guatemala accepts the obligation *aut dedere aut judicare*, since it states that Guatemalan penal law shall apply to “acts committed outside Guatemala by a Guatemalan where a request for extradition has been denied”.

17. Unlike the Penal Code, which deals with ordinary offences, articles 68 and 69 of Guatemala’s Act to Combat Trafficking in Narcotic Drugs establish a number of parameters for drugs-related offences, as follows:

“Article 68. Extradition and procedure for dealing with extradition requests.  
[...]

- (i) In the event that extradition is denied, either by judicial ruling or by decision of the executive branch, Guatemala shall be obliged to prosecute the person whose extradition has been denied and to send a certified copy of the sentence to the requesting State.

<sup>23</sup> Article 5, paragraph 3, reads as follows: “Acts committed outside Guatemala by a Guatemalan where a request for extradition has been denied.” Article 8 reads as follows: “Extradition may be attempted or granted only for ordinary offences. Extradition in accordance with international treaties may be granted only if there is reciprocity. ...”

This article shall apply to the offences characterized in this law.

Article 69. The right to waive extradition proceedings. The State of Guatemala may hand over the person being sought to the requesting party without conducting formal extradition proceedings, provided that the person being sought expresses his or her consent to being handed over before a competent judicial authority."

18. In practice, extradition is not granted simply out of reciprocity in Guatemala. Article 8 of Guatemala's Penal Code establishes that extradition may be attempted or granted only for ordinary offences. It also establishes that extradition in accordance with international treaties may be granted only if there is reciprocity. However, this provision has been superseded by article 27 of the Constitution, which states that extradition is governed by international treaties. Moreover, Guatemalan criminal legislation does not define what is meant by ordinary offences or specify when they are deemed to be political offences. In practice and according to the jurisprudence of the courts, however, the term "political offence" refers to crimes against the security of the State or against the institutional order (Titles XI and XII of the Penal Code).

**Crimes or offences to which the principle of the obligation to extradite or prosecute is applied in the legislation or practice of Guatemala**

19. Guatemala explained that any offence that is extraditable under one or more of the treaties listed above implicitly carries an obligation *aut dedere aut judicare*, provided that no exception is made with respect to the obligation to prosecute in the event that extradition is denied.

**Mauritius**

20. Mauritius submitted a list of international treaties, to which it is party, containing the obligation to extradite or prosecute: the four Geneva Conventions of 12 August 1949 (Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War, 1949); Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, done at Geneva on 10 June 1977<sup>24</sup> and Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, done at Geneva on 10 June 1977;<sup>25</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970 (ratified on 25 April 1983); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (ratified on 25 April 1983); Convention on Psychotropic Substances, Vienna, 1971 (acceded on 8 May 1973); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, New York, 1973 (acceded on 24 September 2003); International Convention against the Taking of

<sup>24</sup> United Nations, *Treaty Series*, vol. 1125, No. 17512.

<sup>25</sup> *Ibid.*, No. 17513.

Hostages, New York, 1979 (ratified on 17 October 1980); Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, New York, 1984 (acceded on 9 December 1992); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988 (acceded on 21 July 2004); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988<sup>26</sup> (acceded on 6 March 2001); International Convention for the Suppression of Terrorist Bombings, New York, 1997 (acceded on 24 January 2003); International Convention for the Suppression of the Financing of Terrorism, New York, 1999 (ratified on 14 December 2004); United Nations Convention against Transnational Organized Crime, New York, 2000 (ratified on 18 April 2003); the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, 2000, supplementary to the United Nations Convention against Transnational Organized Crime (acceded on 24 September 2003); United Nations Convention against Corruption, New York, 2003 (ratified on 14 December 2004).

21. Mauritius also ratified, on 5 April 1983, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963.<sup>27</sup> However that Convention did not impose an obligation to extradite or prosecute, but only required each Contracting State to take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

22. Mauritius further indicated that it had concluded a few bilateral extradition treaties with some countries. However, those bilateral treaties on extradition merely created an obligation to extradite under certain conditions as opposed to an obligation to extradite or prosecute.

23. Mauritius explained that it did not have any specific domestic legislation on the obligation to extradite or prosecute. Even the Extradition Act 1970, which regulated extradition practice in Mauritius, did not contain any provision on *aut dedere aut judicare*. On the other hand, the Extradition Act did not prohibit the extradition of Mauritian nationals; usually in countries where extradition was refused on the basis of nationality, the application of the principle of *aut dedere aut judicare* was required to prevent impunity on the basis of nationality. Under the Prevention of Corruption Act (2002), corruption offences were merely extraditable. The Act did not create an obligation to prosecute or extradite. In that connection section 80 of the Act provided: "Any corruption offence shall be deemed to be an extradition crime for which extradition may be granted or obtained under the Extradition Act." Similarly, section 29 of the Financial Intelligence and Anti-Money-Laundering Act 2002 stated that money-laundering offences were extraditable. The Act did not stipulate an obligation to prosecute or extradite.

24. Mauritius has a few statutory provisions creating jurisdiction for specified crimes, thus enabling the Director of Public Prosecutions to prosecute. In this connection, the Convention for the Suppression of the Financing of Terrorism Act 2003, which implements the Convention for the Suppression of the Financing of Terrorism, provides for the application of the principle of *aut dedere aut judicare*. The financing of terrorism, whether committed in Mauritius or overseas, constitutes

<sup>26</sup> Ibid., vol. 1582, No. 27627.

<sup>27</sup> Ibid., vol. 704, No. 10106.

an offence under section 4 of the Convention for the Suppression of the Financing of Terrorism Act 2003. Section 7(i)(h) of the said Act confers jurisdiction upon a Mauritian Court to try a person suspected of financing terrorism provided the suspect is, after the commission of the act, present in Mauritius whether the act constituting the offence is committed within or outside Mauritius and the person cannot be extradited to a foreign State having jurisdiction over the offence. In the light of the foregoing, it would appear that Mauritian courts are empowered to exercise extraterritorial jurisdiction over foreign nationals suspected to have committed the offence of financing terrorism overseas. The Act creates jurisdiction for the Mauritian Courts to try the offence of financing terrorism, but because any such prosecution is subject to the inability of Mauritius to extradite the suspect, it is clear that the Act provides for the application of the principle of *aut dedere aut judicare*. Similarly the obligation to extradite or prosecute is equally found under section 30(c) of the Prevention of Terrorism Act 2002, which provides that a Mauritian Court shall have jurisdiction to try an offence and inflict the penalties specified in the Act where the act constituting the offence as defined thereunder has been done or completed outside Mauritius and the alleged offender is in Mauritius, and Mauritius does not extradite the alleged offender.

25. Furthermore, Mauritius observed that there were other instruments of cooperation in place to facilitate international cooperation in criminal matters. For example, the Mutual Assistance in Criminal and Related Matters Act 2003 provided for a broad range of assistance including, inter alia, taking of evidence or statements of persons, search and seizure, the provision of documents or evidentiary items, the service of documents and the temporary transfer of persons to assist an investigation or appear as a witness.

## **The Netherlands**

### **International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation**

26. The Netherlands listed the following relevant treaties: International Convention for the Suppression of Counterfeiting Currency, Geneva, 1929; Convention for the Suppression of Illicit Traffic in Dangerous Drugs, Geneva, 1936; Geneva Conventions of 1949 (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War); Convention on the High Seas, Geneva, 1958;<sup>28</sup> Single Convention on Narcotic Drugs, New York, 1961; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; Convention on Psychotropic Substances, Vienna, 1971; International Convention for the Prevention of Pollution from Ships, 1973;<sup>29</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York,

<sup>28</sup> Ibid., vol. 450, No. 6465.

<sup>29</sup> Ibid., vol. 1340, No. 22484.

1973; Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflict, Geneva, 1977; European Convention on the Suppression of Terrorism, Strasbourg, 1977; International Convention against the Taking of Hostages, New York, 1979; Convention on the Physical Protection of Nuclear Material, Vienna, New York, 1980; United Nations Convention on the Law of the Sea, Montego Bay, 1982;<sup>30</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, Montreal, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 1988; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, New York, 1992;<sup>31</sup> Convention on the Safety of United Nations and Associated Personnel, New York, 1994; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 1997; International Convention for the Suppression of Terrorist Bombings, New York, 1997; International Convention for the Suppression of the Financing of Terrorism, New York, 1999; Criminal Law Convention on Corruption, Strasbourg, 1999;<sup>32</sup> United Nations Convention against Transnational Organized Crime, New York, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, New York, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; Convention on Cybercrime, Budapest, 2001;<sup>33</sup> Council Framework Decision on the European Arrest Warrant and the surrender procedure between member States, Brussels, 2002; United Nations Convention against Corruption, New York, 2003.

27. The Netherlands has signed the Protocol amending the European Convention on the Suppression of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism and is in the process of ratifying these treaties.

28. The Netherlands is also a party to the European Convention on Extradition (1957) and both its additional protocols (1975, 1978), which do not contain an obligation *aut dedere aut judicare*, but further international judicial cooperation in the area of criminal law.

29. The Netherlands has also concluded several bilateral extradition agreements.

30. Finally, the Netherlands noted that it is party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and the Convention on Offences and Certain Acts Committed on Board Aircraft, 1963, which do not contain an obligation to extradite or prosecute, but require States to establish jurisdiction in respect of certain offences.

<sup>30</sup> Ibid., vol. 1833, No. 31363.

<sup>31</sup> Ibid., vol. 1974, No. 33757.

<sup>32</sup> European Treaty Series No. 173.

<sup>33</sup> European Treaty Series No. 185.

**Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute**

31. In October 2003, a new law with regard to international crimes entered into force in the Netherlands, which provides for the possibility to prosecute persons suspected of having committed international crimes if the suspect committed international crimes abroad but is arrested on Dutch territory; the suspect committed international crimes abroad against Dutch nationals; the suspect has Dutch nationality. The international crimes considered in this law are genocide, crimes against humanity, war crimes and torture.

**Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare***

32. The Netherlands observed that the international developments at the time of the emergence of the International Criminal Court had prompted the decision to increase the public prosecutor's department's means for such complex prosecutions. Since then, a member of the military from the Democratic Republic of the Congo and two former members of the military from Afghanistan, who had sought asylum in the Netherlands, had been prosecuted for international crimes and sentenced accordingly. Additionally, two Dutch citizens had been arrested on charges of complicity in war crimes and genocide. Some of them had appealed the decision taken by the court in the first instance. More recently, another former Afghan officer and a Rwandan refugee had been arrested and charged with war crimes and torture. The case against the Rwandan national had initially involved charges for war crimes and genocide. The court in the first instance, however, had found the genocide charge inadmissible. Under the new International Crimes Act it was now possible to prosecute foreign nationals for genocide if they were arrested on Dutch territory. However, in 1994 when the suspect had allegedly committed genocide, there had been no such law in force in the Netherlands (*nullum crimen sine lege*). The Public Prosecutor had filed for appeal but there was no verdict yet.

**Russian Federation**

**International treaties to which the Russian Federation is a party that contain the principle of universal jurisdiction in criminal matters**

33. The Russian Federation is a party to the Geneva Conventions of 1949 and Additional Protocol I thereto, which establish universal criminal jurisdiction with regard to war crimes (arts. 49 and 50 of the first Geneva Convention; arts. 50 and 51 of the second Geneva Convention; arts. 129 and 130 of the third Geneva Convention; arts. 146 and 147 of the fourth Geneva Convention; art. 85 of Additional Protocol I of 1977 to the Geneva Conventions).

34. The Russian Federation is also a party to most of the universal and regional international treaties for the suppression of individual crimes that contain the *aut dedere aut judicare* principle. These include, in particular, the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, the European Convention

on the Suppression of Terrorism of 1977, the Convention on the Physical Protection of Nuclear Material of 1979, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988, the International Convention for the Suppression of Terrorist Bombings of 1997, the International Convention for the Suppression of the Financing of Terrorism of 1999, the United Nations Convention against Transnational Organized Crime of 2000 and the United Nations Convention against Corruption of 2003.

35. The Russian Federation is a party to the United Nations Convention on the Law of the Sea, article 105 of which establishes universal criminal jurisdiction with regard to piracy.

36. In addition, the Russian Federation is a party to a number of international treaties which contain the principle of universal jurisdiction, though not in connection with the non-extradition of alleged offenders. These include the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973. The Russian Federation has signed but not yet ratified the Rome Statute of the International Criminal Court.

37. In some international treaties to which the Russian Federation is a party, the *aut dedere aut judicare* principle is not connected with the establishment of universal criminal jurisdiction. For example, article 8 of the International Convention for the Suppression of Counterfeiting Currency of 1929<sup>34</sup> provides that "in countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence".

**Legislation of the Russian Federation concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?**

38. In accordance with article 15, paragraph 4, of the Constitution of the Russian Federation, generally recognized principles and rules of international law and the international treaties to which the Russian Federation is a party shall be an integral part of its legal system. If an international treaty to which the Russian Federation is a party establishes rules that differ from those provided for by law, the rules of international law shall apply.

39. Russian criminal law consists of the Criminal Code of the Russian Federation. Pursuant to article 12, paragraph 3, of the Code, "foreign nationals and stateless persons not permanently residing in the Russian Federation who have committed a crime outside the Russian Federation shall be subject to criminal prosecution under the present Code in cases where the crime is directed against the interests of the Russian Federation or a Russian national or a stateless person permanently residing in the Russian Federation, and in cases provided for by the international treaties to

<sup>34</sup> League of Nations, *Treaty Series*, vol. 112, No. 2623.

which the Russian Federation is a party, if they have not been convicted in a foreign State and are being tried in the territory of the Russian Federation”.

40. The application in the Russian Federation of article 12, paragraph 3, of the Criminal Code is connected with the obligation *aut dedere aut judicare* insofar as the Russian Federation exercises its criminal jurisdiction in accordance with the principle of universality on the basis of an international treaty containing that principle.

**Crimes and offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of the Russian Federation**

41. Under article 12, paragraph 3, of the Criminal Code of the Russian Federation, the Russian Federation's universal jurisdiction applies only to those crimes in respect of which the Russian Federation is bound by an international treaty to exercise its criminal jurisdiction. This concerns primarily crimes against the peace and security of mankind (arts. 353-360 of the Criminal Code: the planning, preparation, initiation or waging of a war of aggression; public calls for the initiation of a war of aggression; the development, production, accumulation, acquisition or sale of weapons of mass destruction; the use of prohibited means and methods of waging war; genocide; ecocide; mercenary activities; attacks on internationally protected persons or institutions) and a number of other crimes referred to in conventions (art. 206, "Hostage-taking"; art. 211, "Hijacking of an aircraft, sea vessel or railway train"; art. 227, "Piracy"; and other articles of the Criminal Code).

**Does the Russian Federation have authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?**

42. The Russian Federation engages in international cooperation on extradition matters not only in accordance with the international treaties to which it is a party but also on the basis of the principle of reciprocity. Pursuant to article 462 of its Code of Criminal Procedure, "the Russian Federation, in accordance with the international treaties to which it is a party or on the basis of the principle of reciprocity, may extradite a foreign national or a stateless person who is present in the territory of the Russian Federation to a foreign State for criminal prosecution or for the enforcement of a sentence for acts which are punishable under the criminal law of the Russian Federation and the laws of the foreign State that has requested the extradition of the person". Article 462, paragraph 2, of the Code specifies that "the extradition of a person on the basis of the principle of reciprocity means that, in accordance with assurances from the foreign State that has requested the extradition, it may be expected that, in a similar situation, extradition will be granted at the request of the Russian Federation".

43. The Constitution of the Russian Federation provides that a Russian national may not be extradited to another State (art. 61, para. 1). Article 13, paragraph 1, of the Russian Criminal Code also provides that "Russian nationals who have committed a crime in the territory of a foreign State shall not be subject to extradition to that State".

44. If the Russian Federation refuses to extradite a person to a foreign State and has criminal jurisdiction in respect of that person (including on the basis of

universal jurisdiction), the competent authorities of the Russian Federation propose that the requesting State supply them with the case file so that the person may be prosecuted in the territory of the Russian Federation.

**Does the State have authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?**

45. The Russian Federation's authority in this regard is provided for in article 12, paragraph 3, of the Criminal Code. As indicated above, the Code provides that the Russian Federation may exercise its criminal jurisdiction in respect of crimes committed outside the Russian Federation by foreign nationals or stateless persons not permanently residing in the territory of the Russian Federation, if the crime is directed against the interests of the Russian Federation or a Russian national or a stateless person permanently residing in the Russian Federation, and in cases provided for by the international treaties to which the Russian Federation is a party, if the foreign nationals or stateless persons not permanently residing in the territory of the Russian Federation have not been convicted in a foreign State.

46. Pursuant to article 460, paragraph 1, of the Code of Criminal Procedure, "the Russian Federation may request a foreign State to extradite a person for criminal prosecution or for the enforcement of a sentence on the basis of an international treaty to which the Russian Federation and the foreign State are parties or on the basis of a written undertaking by the Procurator-General of the Russian Federation from that point onward to extradite persons to that State on the basis of the principle of reciprocity in accordance with the law of the Russian Federation".

**Does the Russian Federation consider the obligation to extradite or prosecute to be an obligation under customary international law and, if so, to what extent?**

47. The Russian Federation believes that this question requires further study by the Special Rapporteur and the International Law Commission. However, it considers that the following points should be taken into account.

48. The extradition and prosecution of persons are, as a matter of principle, sovereign rights of the State in whose territory the offender is present. Within its territorial jurisdiction, a State is entitled to decide independently whether extradition or the administration of criminal justice is appropriate. In certain circumstances it may even refrain entirely from prosecuting a person, for example, in exchange for testimony or assistance in the conduct of a criminal investigation.

49. It goes without saying that, when an international treaty containing the obligation *aut dedere aut judicare* is concluded, a State may no longer decide at its sole discretion whether to prosecute or extradite an alleged offender, since it becomes bound by the relevant treaty obligation. Moreover, it is hardly possible, under customary international law, to presume the existence of such an obligation, which significantly restricts the sovereign rights of States in a sensitive area of public law.

50. The Russian Federation does not share the view that the existence of an obligation under customary international law may be inferred from the existence of a large body of international treaties that provide for such an obligation. Otherwise it could be asserted that the conclusion by States of a large number of extradition treaties testifies to the emergence of a customary rule that obliges States to grant

extradition requests. However, in itself the existence of such treaties, even a large number of them, is insufficient proof of the existence of a customary rule of international law. At the same time, it is generally accepted that obligations relating to extradition may arise only from the relevant international instruments.

51. In our view, the existence of a customary rule obliging States to exercise their criminal jurisdiction or to grant extradition requests in respect of a specific type of crime may also not readily be inferred from the existence of a customary rule prohibiting these types of crimes.

52. As the International Court of Justice noted in its Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States. The Russian Federation a priori does not rule out the existence of a rule of customary international law that obliges States to extradite or prosecute persons in respect of certain categories of crime. However, we believe that the existence and scope of application of such a rule may be established only if relevant State practice is identified in the absence of treaty obligations, together with evidence that States act as they do precisely because they consider themselves bound by a rule of law.

53. The latter element here is particularly important, given that in practice it is difficult to determine when a State that extradites or prosecutes a particular person is acting on the basis of the *aut dedere aut judicare* principle. If a State is not bound by a treaty, it may extradite an alleged offender present in its territory not because it considers itself bound by any obligation to another State but simply on the basis of the principle of reciprocity.

54. We believe that significant evidence of *opinio juris* on this issue could come from the judgements of national courts or official declarations of States which state explicitly that the refusal to extradite places an obligation on the requested State to refer the case to the competent national authorities, even in the absence of a relevant treaty obligation. We do not yet see such convincing evidence of the existence of a customary rule *aut dedere aut judicare*.

55. The question of the establishment of an obligation *aut dedere aut judicare* in customary international law with respect to a small number of criminal acts that arouse the concern of the entire international community merits separate analysis. This concerns primarily genocide, war crimes and crimes against humanity.



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## Thirteenth report on reservations to treaties\*

By Mr. Alain Pellet, Special Rapporteur\*\*

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\* Although the eleventh, twelfth and thirteenth reports constitute a single text, they have been issued as separate documents under the symbols A/CN.4/574, A/CN.4/584 and in the present document, respectively. Thus, the numbering of paragraphs and footnotes is continuous.

\*\* The author gratefully acknowledges the major role played by Daniel Müller in the preparation of this report. Mr. Müller is the author of the commentary on articles 20 and 21 in Olivier Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Brussels, Bruylant, 2006, pp. 797-934 (English edition to be published in 2009 by Oxford University Press).



## II. Reactions to interpretative declarations

276. The "provisional plan of the study"<sup>460</sup> does not mention the issue of States' and international organizations' reactions to interpretative declarations. This is because it was not originally intended that such reactions should be considered together with reservations; not until later did the desirability of a parallel study of reservations and interpretative declarations become clear.<sup>461</sup>

277. The Vienna Conventions on the law of treaties make no reference to interpretative declarations — which were touched upon only briefly in the *travaux préparatoires* for those texts<sup>462</sup> — and thus say nothing about reactions to interpretative declarations, the forms they may take, the procedure for formulating them or their effects. Accordingly, the scarcity or uncertainty of practice in this area makes it necessary to take an approach that differs from the one adopted in considering the issue of objection to and acceptance of reservations.<sup>463</sup> As the Commission has already noted in its work on interpretative declarations:

"In view of the lack of any provision on interpretative declarations in the Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can only proceed by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional."<sup>464</sup><sup>465</sup>

278. In the light of these remarks, it is important not to overlook the differences between reservations and interpretative declarations, which are not intended to produce the same legal effects on the treaty: while a "reservation", by definition, purports "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization",<sup>466</sup> an interpretative declaration, according to draft guideline 1.2, "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions".

279. The legal effects which reservations, on the one hand, and interpretative declarations, on the other, are meant to produce are thus different and do not, in fact, have the same impact on the treaty: whereas a reservation, by definition, purports to modify or to exclude completely the legal effects of either a provision of a treaty or the treaty as a whole with regard to certain aspects of its application to the reserving State or organization, an interpretative declaration does not (at least openly) purport to modify the treaty's legal effects with regard to the declarant, but merely to clarify

<sup>460</sup> See the second report on reservations to treaties (A/CN.4/477), para. 37; see also the seventh report (A/CN.4/526), para. 18.

<sup>461</sup> See the fifth report on reservations to treaties (A/CN.4/508/Add.3), paras. 217 and 218.

<sup>462</sup> See the third report on reservations to treaties (A/CN.4/491/Add.1), paras. 64-68.

<sup>463</sup> See the twelfth report on reservations to treaties (A/CN.4/584), para. 183.

<sup>464</sup> On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentary pertaining to them in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)*, chap. VI, sect. C.2, pp. 223-249.

<sup>465</sup> See the general commentary on section 2.4 (Procedure for interpretative declarations), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10)*, chap. IV, sect. C.2, p. 115.

<sup>466</sup> See draft guidelines 1.1 and 1.1.1, *Yearbook ... 1998*, vol. II, part two, pp. 99 and 101.

its meaning. This essential difference<sup>467</sup> makes it justifiable, and indeed necessary, for the rules governing reactions to interpretative declarations to be more than a mere copy of the Vienna Conventions' rules on acceptance of and objection to reservations (see section A below).

280. This is far less evident in the case of conditional interpretative declarations, which should be clearly distinguished from "simple" interpretative declarations.<sup>468</sup> Under draft guideline 1.2.1, a conditional interpretative declaration is a unilateral statement "whereby [the author] subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof".<sup>469</sup> Thus, although a conditional interpretative declaration does not produce legal effects that differ from those of a "simple" interpretative declaration, it is characterized by the fact that its author "does not merely propose an interpretation, but makes its interpretation a condition of its consent to be bound by the treaty",<sup>470</sup> "so that they [conditional interpretative declarations] come closer to being a reservation".<sup>470</sup> However, this does not in itself mean that the regime for reactions to interpretative declarations should be identical to the one for reactions to (acceptance of and objection to) reservations. This is only a working hypothesis that should be explored (see section B below).<sup>471</sup>

#### A. Interpretative declarations (general regime)

281. Owing to the exclusion of interpretative declarations from the Vienna Conventions, articles 19 to 23 of those texts do not apply to reactions to interpretative declarations, according to the positions taken in the vast majority of cases in the literature, which stress the difference between the legal regimes applicable in this respect to reservations, on the one hand, and interpretative declarations, on the other.<sup>472</sup> This difference is clearly delineated in Ethiopia's "objection" to Yemen's declaration concerning the United Nations Convention on the Law of the Sea, signed in Montego Bay in 1982:

"the declaration [of Yemen], not constituting a reservation as it is prohibited by article 309 of the Convention, is made under article 310 of same and as such is not governed by articles 19-23 of the Vienna Convention on the Law of Treaties providing for acceptance of and objections to reservations".<sup>473</sup>

282. Nonetheless, an interpretative declaration, like a reservation, may logically generate three types of reactions on the part of the States and international organizations concerned:

<sup>467</sup> See draft guideline 1.3 (Distinction between reservations and interpretative declarations), *Yearbook ... 1999*, vol. II, part two, p. 107.

<sup>468</sup> See para. 277 above.

<sup>469</sup> *Yearbook ... 1999*, vol. II, part two, p. 103.

<sup>470</sup> *Ibid.*, para. (1) of the commentary on draft guideline 1.2.1.

<sup>471</sup> *Yearbook ... 1999*, vol. II, part two, p. 105, para. 14 of the commentary on draft guideline 1.2.1.

<sup>472</sup> See, in particular, D. M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.*, 1978, pp. 155-173, especially p. 166; Franck Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Institut, 1988, p. 244; Rosario Sapienza, *Dichiarazioni interpretative unilaterale e trattati internazionali*, Milan, A. Giuffrè, 1996, p. 274.

<sup>473</sup> *Multilateral treaties deposited with the Secretary-General (Status as at 31 December 2006)*, document ST/LEG/SER.E/25, vol. II, p. 364 (chap. XXI.6).

- A positive reaction whereby the author expresses, either explicitly or implicitly, agreement with the unilateral interpretation proposed by the State or organization that made the interpretative declaration (see paras. 283-287 below);
- A negative reaction whereby the author expresses disagreement with the interpretation proposed by the State or organization that made the interpretative declaration, or expresses opposition to its classification as an "interpretative declaration", usually on the ground that it is in reality a reservation (see paras. 288-298 below);
- Silence; i.e., the absence of any explicit manifestation of approval or opposition (see paras. 307-316 below).

Interpretative declarations or statements that are presented as such may also elicit a fourth type of reaction that does not specifically concern the substance of the declaration, but rather its classification (see paras. 299-306 below).

#### 1. Positive reaction — approval

283. It appears that State practice with respect to positive reactions to interpretative declarations is virtually non-existent. However, *Multilateral treaties deposited with the Secretary-General* includes a text submitted by Israel reacting positively to a declaration submitted by the Arab Republic of Egypt<sup>474</sup> concerning the United Nations Convention on the Law of the Sea:

"The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.

In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.

It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration".<sup>475</sup>

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the Montego Bay Convention. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned "approbatory declaration" made by Israel.

<sup>474</sup> "The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait" (ibid., p. 344).

<sup>475</sup> Ibid., p. 364. In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the formulation of these declarations, it may be wondered whether they might have been made as a result of a diplomatic agreement.

284. Another example that could be cited is the reaction of the Government of Norway to a declaration made by France concerning the 1978 Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships, published by the Secretary-General of the International Maritime Organization:

“the Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible”.<sup>476</sup>

It appears that this statement can be interpreted to mean that Norway accepts the French declaration insofar as it does not constitute a reservation.

285. These very rare examples show that a situation may arise in which a State or an international organization expresses agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement between the respective interpretations of two or more parties is expressly envisaged in article 31, paragraph 3 (a), of the Vienna Conventions, which provides that, for the interpretation of a treaty,

“There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.

286. However, it is not necessary at this stage of the study to specify the legal effect which the expression of such agreement with an interpretative declaration may produce. It suffices to note that such agreement should not be confused with the acceptance of a reservation, if only because, under article 20, paragraph 4, of the Vienna Conventions, such acceptance entails the entry into force of the treaty for the reserving State — which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, it would be wise to use different terms. The term “approval”, which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,<sup>477</sup> could be used to denote a positive reaction to an interpretative declaration.

287. In view of these considerations, a draft guideline 2.9.1 worded as follows could be placed at the beginning of section 2.9 (Formulation of reactions to interpretative declarations) to define the expression “approval of an interpretative declaration”:

## **2.9 Formulation of reactions to interpretative declarations**

### **2.9.1 Approval of an interpretative declaration**

“Approval” of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

<sup>476</sup> *Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions (as of 31 December 2007)*, p. 108 (note 1).

<sup>477</sup> See Jean Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant/AUF, 2001, pp. 74-75 (Approbation, 1.).

## 2. Negative reaction — opposition

288. Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic<sup>478</sup> in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

“The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act”.<sup>479</sup>

289. The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in Geneva in 1958, Canada declared “[... t]hat it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1”.<sup>480</sup>

The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of “interpretative declarations”, which also prompted an onslaught of negative reactions by other contracting States. Tunisia, in its communication of 22 February 1994, made it known, for example, that:

“[...] in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.

“The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf”.<sup>481</sup>

<sup>478</sup> This declaration reads as follows: “D — The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

The expression ‘the threat or use of force’ used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests” (*Multilateral treaties* ..., note 473 above, vol. II, p. 412 (note 146) (chap. XXIII.1).

<sup>479</sup> *Ibid.*, p. 416.

<sup>480</sup> *Ibid.*, p. 329 (chap. XXI.4). The German interpretative declaration reads as follows: “The Federal Republic of Germany declares with reference to article 5, paragraph 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, paragraph 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice” (*ibid.*, p. 328).

<sup>481</sup> *Ibid.*, p. 372 (note 16). The relevant part of the Maltese declaration reads as follows:

“The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured” (*ibid.*, p. 352).

Another very clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the Montego Bay Convention:

"Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which 'the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'. According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it".<sup>482</sup>

290. Examples can also be found in the practice of States members of the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the 1995 Framework Convention for the Protection of National Minorities, in which they specified the meaning to be ascribed to the term "national minority", declared that it:

"[...] considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term 'national minority', which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities".<sup>483</sup>

291. Furthermore, the example of the statement of Italy regarding the interpretative declaration of India shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is "more accurate". This practice of "constructive" refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the March 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal:

"The Government of Italy, in expressing its objection vis-à-vis the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes".<sup>484</sup>

Other States which had made an interpretative declaration comparable to that of Italy did not feel it was necessary to react in the same way that the Italian Government had, but merely remained silent.<sup>485</sup>

<sup>482</sup> Ibid., p. 364.

<sup>483</sup> *European Treaty Series*, No. 157 (<http://conventions.coe.int>).

<sup>484</sup> *Multilateral treaties ...*, note 473 above, p. 522 (chap. XXVII.3).

<sup>485</sup> On the question of "silence", see paras. 307-316 below.

292. The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation. The conditions set by Germany, Poland and Turkey for consenting to Poland's interpretative declaration in respect of the European Convention on Extradition of 13 December 1957<sup>486</sup> are a good example of this. Hence, Germany considered:

"the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1(a) of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a State other than that in respect of which asylum has been granted".<sup>487</sup>

293. A number of Western States had a comparable reaction to the declaration made by Egypt upon ratification of the 1997 International Convention for the Suppression of Terrorist Bombings.<sup>488</sup> Considering that the declaration by the Arab Republic of Egypt "aims ... to extend the scope of the Convention" — which excludes assigning the status of "reservation" — the German Government declared that [it]:

"is, of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany".<sup>489</sup>

294. In the context of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, a declaration by Canada concerning Arctic waters also triggered conditional reactions. France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they:

"take [ ] note of this declaration by Canada and consider [ ] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations

<sup>486</sup> Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with paragraph 1(a) of Article 6, that it will under no circumstances extradite its own nationals.

The Republic of Poland declares that, for the purposes of this Convention, in accordance with paragraph 1(b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (*European Treaty Series*, No. 024 (<http://conventions.coe.int>)).

<sup>487</sup> See also the identical reaction of Austria to the interpretative declaration of Romania (*ibid.*).

<sup>488</sup> The Egyptian "reservation" is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral treaties ...*, note 473 above, p. 135 (chap. XVIII.9)).

<sup>489</sup> *Ibid.*, p. 140. See also comparable declarations by the United States of America (*ibid.*, p. 142), the Netherlands (*ibid.*, pp. 142-143), the United Kingdom of Great Britain and Northern Ireland (*ibid.*, pp. 145-146) and Canada (*ibid.*, p. 150 (note 6)).

Convention on the Law of the Sea. In particular, the ... Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".<sup>490</sup>

295. The Czech declaration made further to Germany's interpretative declaration<sup>491</sup> in respect of part X of the Montego Bay Convention should be viewed from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or reclassifying the declaration as a reservation:

"The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention".<sup>492</sup>

296. Such "conditional acceptances" do not constitute "approvals" within the meaning of draft guideline 2.9.1 and should be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

297. All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a counter-proposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, a negative reaction is therefore comparable, to some extent, to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against

<sup>490</sup> For the text of the Canadian declaration, see *Status of Multilateral Conventions and Instruments* ..., note 476 above, p. 106.

<sup>491</sup> The relevant part of the German declaration reads as follows: "As to the regulation of the freedom of transit enjoyed by landlocked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the landlocked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral treaties* ..., note 473 above, p. 348 (chap. XXI.6)).

<sup>492</sup> See *Multilateral treaties* ..., note 473 above, p. 371 (note 13) (chap. XXI.6).

establishing an interpretation of the treaty that it might consider opposable, which it does not find appropriate,<sup>493</sup> and about which it must speak out.

298. That is why "opposition"<sup>494</sup> might be an apt term for negative reactions to an interpretative declaration, rather than "objection", even though this word has sometimes been used in practice.<sup>495</sup> Based on the model adopted for the definition of objections,<sup>496</sup> draft guideline 2.9.2 could define such opposition to an interpretative declaration as the intention of, and effect anticipated by, its author, as follows:

### 2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

## 3. Reclassification

299. As illustrated in the third report on reservations to treaties, naming or phrasing of a unilateral statement by its author as a "reservation" or an "interpretative declaration" is not relevant for the purposes of classifying such a unilateral statement,<sup>497</sup> even if it provides a significant clue as to its nature.<sup>498</sup> This is conveyed by the phrase "however phrased or named" in draft guideline 1.1 (article 2, paragraph 1(d), of the Vienna Conventions) and draft guideline 1.2 of the Guide to Practice.

300. What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements which their authors call interpretative, and to expressly

<sup>493</sup> In this connection, see Lord McNair, *The Law of Treaties*, Oxford University Press, 1961, pp. 430-431.

<sup>494</sup> In the *Dictionnaire de droit international public*, the term "protestation" is defined as follows: "Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties" (note 477 above, p. 907).

<sup>495</sup> See, for example, Italy's reaction to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see note 484 above). The reaction of Canada to the interpretative declaration of Germany to the Geneva Convention on the Continental Shelf (see note 480 above) was also registered in the "objection" category by the Secretary-General.

<sup>496</sup> See draft guideline 2.6.1 and its commentary, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, chap. X, sect. 2.C, pp. 185-202.

<sup>497</sup> A/CN.4/491/Add.4, para. 282. See also draft guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

<sup>498</sup> In this connection, draft guideline 1.3.2 (Phrasing and name) provides that: "The phrasing or name given to a unilateral declaration is an indication of the purported legal effect. This is the case in particular when a State or international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations". For commentary on this provision, see *Yearbook ... 1999*, vol. II, part two, pp. 109-111.

consider them as reservations.<sup>499</sup> These reactions, which might be called "reclassifications" to reflect their purpose, in no way resemble approval or opposition, since, of course, they do not refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

301. There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to Algeria's interpretative declaration in respect of article 13, paragraphs 3 and 4, of the 1966 International Covenant on Economic, Social and Cultural Rights:

"In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it";<sup>500</sup>

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

"The Government of ... therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

The Government of ... therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan".<sup>501</sup>

(c) The reactions of many States to the declaration made by the Philippines with respect to the 1982 Montego Bay Convention:

"The ... considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof".<sup>502</sup>

<sup>499</sup> Nor do the tribunals and treaty monitoring bodies hesitate to requalify an interpretative declaration as a reservation (see paras. (5) to (7) of the commentary on draft article 1.3.2, *Yearbook ... 1999*, vol. II, part two, pp. 109-111. This, however, does not touch on the formulation of these reactions; it is therefore not useful to revisit it here.

<sup>500</sup> *Multilateral ...*, note 473 above, vol. I, pp. 170-171 (chap. IV.3). See also the objection of Portugal (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

<sup>501</sup> *Ibid.*, p. 170. See also the objections registered by Denmark (*ibid.*, p. 167), Spain (*ibid.*, p. 172), Finland (*ibid.*, pp. 167-168), France (*ibid.*, p. 168), Latvia (*ibid.*, p. 170), Norway (*ibid.*, p. 171), Netherlands (*ibid.*, p. 170), United Kingdom of Great Britain and Northern Ireland (*ibid.*, p. 174) and Sweden (*ibid.*, pp. 172-173).

<sup>502</sup> *Ibid.*, vol. II, p. 363 (chap. XXI.6); see also the reactions similar in letter or in spirit from Australia, Bulgaria, Russian Federation and Ukraine (*ibid.*, pp. 363-365).

(d) The reclassification formulated by Mexico, which considered that:

"... the third declaration [formally classified as interpretative] submitted by the Government of the United States of America (...) constitutes a unilateral claim to justification, not envisaged in the Convention [the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention".<sup>503</sup>

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the Rights of the Child of 20 November 1989, "adopt any legislative or statutory decision that conflicts with the Tunisian Constitution":

"The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [sic] of article 4 ...".<sup>504</sup>

(f) The reactions of 19 States to the declaration made by Pakistan with respect to the 1997 International Convention for the Suppression of Terrorist Bombings, whereby Pakistan specified that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination":

"The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose ...".<sup>505</sup>

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

"The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia".<sup>506</sup>

<sup>503</sup> Ibid., vol. I, p. 483 (chap. VI.19).

<sup>504</sup> Ibid., p. 340 (chap. IV.11).

<sup>505</sup> Ibid., vol. II, p. 138 (chap. XVIII.9). See the reactions similar in letter or in spirit from Germany, Australia, Canada, Denmark, Finland, France, Spain, United States, India, Israel, Italy, Japan, Norway, New Zealand, Netherlands, United Kingdom and Sweden (ibid., pp. 138-146). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (ibid., pp. 140 and 143).

<sup>506</sup> Ibid., p. 124 (chap. XVIII.7).

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the 1953 Convention on the Political Rights of Women could only be implemented in accordance with the Constitution of Bangladesh:

"In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.

The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted".<sup>507</sup>

302. These examples show that reclassification consists of considering that a unilateral statement submitted as an "interpretative declaration" is in reality a "reservation", with all the legal effects that this entails. Thus, reclassification seeks to change the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "reclassifying" State or organization. As a general rule, such declarations, which are usually extensively reasoned,<sup>508</sup> are based essentially on the criteria for distinguishing between reservations and interpretative declarations.<sup>509</sup>

<sup>507</sup> Ibid., p. 86 (chap. XVI.1). See also the identical declaration of Norway (ibid.).

<sup>508</sup> For a particularly striking example, see the reactions to Pakistan's interpretative declaration in relation to the International Covenant on Economic, Social and Cultural Rights (para. 301 (b) above and note 501 above).

<sup>509</sup> See draft guidelines 1.3 to 1.3.3:

*1.3 Distinction between reservations and interpretative declarations*

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

*1.3.1 Method of implementation of the distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

*1.3.2 Phrasing and name*

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

*1.3.3 Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

303. Draft guideline 2.9.3 is based on this State practice and defines "reclassification" accordingly:

**2.9.3 Reclassification of an interpretative declaration**

"Reclassification" means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or organization purports to regard the declaration as a reservation and to treat it as such.

[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

304. The examples cited show that, in practice, States almost always combine the reclassification with an objection to the reservation. It should be borne in mind, however, that reclassifying an interpretative declaration as a reservation is one thing and objecting to the reservation thus "reclassified" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a reclassification *and* an objection must abide by the procedural rules and time periods applicable to reclassification<sup>510</sup> *and* objection,<sup>511</sup> and that, in principle, the time period for formulating such a "combined statement" is accordingly shortened to the one provided for in article 20, paragraph 5, of the Vienna Conventions and in draft guideline 2.6.13.<sup>512</sup> An objection submitted after that time period cannot produce all of its legal effects and the reclassified reservation must be regarded as having been accepted.<sup>513</sup>

305. This is why it is specified, at the end of the first paragraph of draft guideline 2.9.3, that the author State or organization must accordingly treat the reclassified reservation as such.

306. The second paragraph, while following the usual practice, provides a logical corollary to the rules already adopted by the Commission with respect to the distinction between reservations and interpretative declarations. It seems desirable to place this provision here, for reasons more of convenience than of strict logic, as this stipulation concerns the substantive rules for making the distinction rather than the rules governing formulation as such. This is why the provision is in square brackets.

#### 4. Silence

307. The practice surveyed above reveals that States make considerable use of silence in relation to interpretative declarations. Express positive and even express negative reactions are extremely rare. It should therefore be asked whether this pervasive silence can be taken to signify consent to the interpretation proposed by

<sup>510</sup> See paras. 317-323 below.

<sup>511</sup> See the eleventh report on reservations to treaties (A/CN.4/574), paras. 87-114.

<sup>512</sup> Ibid., para. 128, draft guideline 2.6.13.

<sup>513</sup> Ibid., para. 143, draft guideline 2.6.15.

the State or the international organization that formulated the interpretative declaration.

308. In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the "very great allowance made for tacit assent to reservations",<sup>514</sup> and the work of the International Law Commission has from the outset acknowledged the considerable part played by tacit acceptance.<sup>515</sup> Sir Humphrey Waldock justified the principle of tacit acceptance by pointing out that:

"[i]t is (...) true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State".<sup>516</sup>

309. In the case of simple interpretative declarations (as opposed to conditional declarations), these concerns do not arise. By definition, an interpretative declaration purports only to "specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions", and in no way imposes conditions on its author's consent to be bound by the treaty.<sup>517</sup> Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author's legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

310. Thus, since it is not possible to proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. It is indeed inconceivable that silence, in itself, could produce such a legal effect. The following comment by Gionata Buzzini in a study on silence in response to a violation of a rule of international law is fully applicable here: "*le silence en tant que tel ne dit rien*

<sup>514</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion, I.C.J. Reports 1951, p. 21.*

<sup>515</sup> See D. Müller, commentary on article 20 (1969), in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Brussels, Bruylant, 2006, pp. 814-815, paras. 31 and 32.

<sup>516</sup> First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 15.

<sup>517</sup> The situation is evidently different with respect to conditional interpretative declarations. See paras. 324-330 below.

*puisque'il est capable de 'dire' trop de choses à la fois*" (silence in itself says nothing because it is capable of 'saying' too many things at once).<sup>518</sup>

311. Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because it accurately reflects their own position, or they may feel that the interpretation is erroneous but that there is no point in proclaiming as much because, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to decide which of these two hypotheses is correct.

312. Moreover, this appears to be the position most widely supported in the literature. Franck Horn states that:

"Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation".<sup>519</sup>

313. Thus, although silence cannot in itself be construed as either approval or opposition — neither of which can by any means be presumed — the position taken by F. Horn indicates that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of interpreting treaties, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) ...

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be".

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

314. But this provision does not define the "conduct" in question and it seems extremely difficult, if not impossible, to determine in advance the circumstances in

<sup>518</sup> "Abstention, silence et droit international général", *Rivista di Diritto internazionale*, 2005/2, p. 382.

<sup>519</sup> F. Horn, note 472 above, p. 244 (footnotes omitted); see also D. M. McRae, note 472 above, p. 168.

which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.<sup>520</sup> In other words, it is particularly difficult to determine when and in what specific circumstances silence is tantamount to consent.<sup>521</sup> As the Eritrea-Ethiopia Boundary Commission underscored:

"The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule — whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first".<sup>522</sup>

315. It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its silence, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

316. Draft guidelines 2.9.8 and 2.9.9 reflect the principles inferred from State practice. The former unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable with respect to silence on the part of a State or an international organization in response to an interpretative declaration and that silence cannot in itself be construed as either approval or opposition. The latter points out to users of the Guide to Practice that, although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, in some circumstances the silent State may be considered

<sup>520</sup> See, among others, Ch. Rousseau, *Droit international public*, vol. I: *Introduction et sources*, Paris, Sirey, 1970, p. 430, No. 347.

<sup>521</sup> In this connection, Heinrich Drost, "Grundfragen der Lehre vom internationalen Rechtsgeschäft", in D. S. Constantopoulos and Hans Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebenzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: "Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage — etwa nach vorhergegangener Notifikation — Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann" (The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances — following prior notification, for example — silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will).

<sup>522</sup> Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Permanent Court of Arbitration, *Reports of International Arbitral Awards*, vol. XXV, p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Temple of Preah Vihear* case, *I.C.J. Reports* 1962, p. 40.

as having acquiesced to the declaration by reason of its conduct or lack of conduct in relation to the interpretative declaration.

#### **2.9.8 Non-presumption of approval or opposition**

Neither approval of nor opposition to an interpretative declaration shall be presumed.

#### **2.9.9 Silence in response to an interpretative declaration**

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

### **5. Rules applicable to the formulation of an approval, opposition or reclassification in respect of an interpretative declaration**

317. While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard<sup>523</sup> but that any legal effects which they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions. Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at this stage, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

"Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument".<sup>524</sup>

318. In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

"contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation".<sup>525</sup>

319. Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also for enabling the other States and international organizations concerned to determine their own position

<sup>523</sup> See note 526 below.

<sup>524</sup> Advisory opinion of 11 July 1950, *International status of South-West Africa*, I.C.J. Reports 1950, pp. 135-136.

<sup>525</sup> See note 472 above.

with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the study on the form and communication of interpretative declarations themselves:

"There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice".<sup>526</sup>

320. There is no reason to take a different approach with respect to reactions to such interpretative declarations and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to:

(a) Formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the reaction;

(b) State the reasons for the reaction; as shown by the practice described above,<sup>527</sup> States generally take care to explain, sometimes in great detail, the reasons for their approval, protest or reclassification. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue";

(c) Follow, in making such statements, the same communication and notification procedure applicable to the communication and notification of other declarations in respect of the treaty (reservations, objections or acceptances).

321. Although the Special Rapporteur is convinced of the soundness of these recommendations, he is hesitant to propose a draft guideline reflecting them because the Commission has not adopted equivalent guidelines with respect to interpretative declarations themselves. If, however, the Commission considers that it would be useful to include a draft guideline to this effect in the Guide to Practice, such a guideline could consist only of recommendations modelled on those adopted, for example, with respect to statements of reasons for reservations<sup>528</sup> and objections to reservations.<sup>529</sup> Such a provision, if included, could draw upon those concerning the procedure for other types of declarations in respect of a treaty — which is, in fact, quite uniform — as contained in draft guidelines 2.1.1 to 2.1.7 on reservations, 2.4.1

<sup>526</sup> Sixth report on reservations to treaties (A/CN.4/518/Add.1), para. 130.

<sup>527</sup> See paras. 288-295 and 301 above.

<sup>528</sup> See A/CN.4/586.

<sup>529</sup> See the eleventh report on reservations to treaties (A/CN.4/574), paras. 110-111.

and 2.4.7 on interpretative declarations, 2.6.7, 2.6.9 and 2.6.10 on objections to reservations and 2.8.3 to 2.8.5 on express acceptance of reservations.<sup>530</sup>

#### **2.9.5 Written form of approval, opposition and reclassification**

An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

#### **2.9.6 Statement of reasons for approval, opposition and reclassification**

Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

#### **2.9.7 Formulation and communication of an approval, opposition or reclassification**

An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

322. With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame, when the declarations themselves are not, as a general rule (and in the absence of a provision to the contrary in the treaty), subject to any particular time frame.<sup>531</sup>

323. Moreover, and on this score reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)<sup>532</sup> and the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting parties (and probably no effect at all, for as long as the author State or international organization has not expressed consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted Ethiopia's opposition to the interpretative declaration formulated by the Arab Republic of Yemen with respect to the Montego Bay Convention even though Ethiopia has not ratified the Convention.<sup>533</sup>

#### **2.9.4 Freedom to formulate an approval, protest or reclassification**

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any

<sup>530</sup> In the last two cases, the draft guidelines mentioned are numbered as shown in the eleventh and twelfth reports on reservations (see A/CN.4/574, paras. 87-98 and 105-111, and A/CN.4/584, paras. 225-236); this numbering may be changed by the Drafting Committee.

<sup>531</sup> See the commentary on draft guideline 1.2, *Yearbook ... 1999*, vol. II, part two, pp. 101-103, paras. 21-32.

<sup>532</sup> See note 526 above.

<sup>533</sup> See *Multilateral treaties ...*, note 473 above, vol. II, p. 364 (chap. XXI.6).

contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

## B. Conditional interpretative declarations

324. Conditional interpretative declarations differ from "simple" interpretative declarations in their potential effect on the treaty's entry into force. The key feature of conditional interpretative declarations is that the author makes its consent to be bound by the treaty subject to the proposed interpretation. If this condition is not met, i.e. if the other States and international organizations parties to the treaty do not consent to this interpretation, the author of the interpretative declaration is considered not to be bound by the treaty, at least with regard to the parties to the treaty that contest the declaration. The declaration made by France upon signing<sup>534</sup> Additional Protocol II to the Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America provides a particularly clear example of this:<sup>535</sup>

"In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States".

325. As recalled earlier,<sup>536</sup> this feature brings conditional interpretative declarations infinitely closer to reservations than "simple" interpretative declarations. The commentary on draft guideline 1.2.1 (Conditional interpretative declarations) states, in this connection:

"Consequently, it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations, especially with regard to the anticipated reactions of the other contracting parties to the treaty, than would the rules applicable to simple interpretative declarations".<sup>537</sup>

326. Given the conditionality of such an interpretative declaration, the regime governing reactions to it must be more orderly and definite than the one applicable to "simple" interpretative declarations. There is a need to know with certainty and within a reasonable time period the position of the other States parties concerning the proposed interpretation so that the State or organization that submitted the conditional interpretative declaration will be able to take a decision on its legal status with respect to the treaty — is it or is it not a party to the treaty? These questions arise in the same conditions as those pertaining to reservations to treaties, the reactions to which (acceptance and objection) are governed by a very formal, rigid legal regime aimed principally at determining, as soon as possible, the legal status of the reserving State or organization. This aim is reflected not only by the relative formality of the rules, but also by the establishment of a presumption of acceptance after a certain period of time has elapsed in which another State or

<sup>534</sup> The declaration was confirmed upon ratification, on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

<sup>535</sup> See also *Yearbook ... 1999*, vol. II, part two, p. 103, para. 3 of the commentary on draft guideline 1.2.1.

<sup>536</sup> See para. 280 above.

<sup>537</sup> See para. 14 of the commentary (italics added).

another international organization has not expressed disagreement with — i.e., objection to — the reservation.<sup>538</sup>

327. Thus, the procedure for reactions to conditional interpretative declarations should follow the same rules as those applicable to acceptance of and objection to reservations, including the rule on the presumption of acceptance. There may be doubts, however, about the 12-month time period set out in article 20, paragraph 5, of the Vienna Conventions, which, as explained earlier, is probably not reflective of customary international law. Nonetheless, the reasons that led Sir Humphrey to propose this solution seem valid and transposable *mutatis mutandis* to the case of conditional interpretative declarations. As he explained:

“But there are, it is thought, good reasons for proposing the adoption of the longer period [of 12 months]. First, it is one thing to agree upon a short period [of three or six months] for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed”.<sup>539</sup>

328. A problem of terminology arises, however. The relative parallelism noted up to this point between conditional interpretative declarations and reservations implies that reactions to such declarations could borrow the same vocabulary and be termed “acceptances” and “objections”. However, the definition of objections to reservations does not seem to be at all suited to the case of a reaction expressing the disagreement of a State or an international organization with a conditional interpretative declaration made by another State or another international organization. Draft guideline 2.6.1 lays down a definition of objections to reservations that is based essentially on the effect intended by their author: according to this definition, an objection means a unilateral statement “whereby the (...) State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization”.<sup>540</sup>

329. It is certainly difficult to state categorically, at the current stage of the work on the Guide to Practice and in the absence of a decision by the Commission on the legal effects of a conditional interpretative declaration on a treaty, whether an “objection” to such a declaration falls under this definition. However, there may be serious doubts about the wisdom of using the same terminology to denote both negative reactions to conditional interpretative declarations and objections to reservations. By definition, such a reaction can neither modify nor exclude the legal effect of the conditional interpretative declaration as such (regardless of what that legal effect may be); all it can do is to exclude the State or international organization from the circle of parties to the treaty. Refusal to accept the *conditional*

<sup>538</sup> See draft guideline 2.4.8, Late formulation of a conditional interpretative declaration: “A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.”

<sup>539</sup> See the first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 16.

<sup>540</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, chap. X, sect. C.2 (2.6.1), p. 186.

interpretation proposed creates a situation in which the condition for consent to be bound is absent. What is more, it is not the author of the negative reaction, but the author of the conditional interpretative declaration, that has the responsibility to take the action that follows from the refusal.

330. The Special Rapporteur therefore considers that, for the moment, it is best to leave the terminology issue in abeyance until the Commission has taken a final decision on the effects of conditional interpretative declarations and on their possible assimilation to reservations.

#### **2.9.10 Reactions to conditional interpretative declarations**

Guidelines 2.6 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.

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